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Supreme Court of the United States

OCTOBER TERM, 1962

No. 150

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES
COMPANY, ET AL., PETITIONERS,

vs.

NEW YORK STOCK EXCHANGE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 31, 1962
CERTIORARI GRANTED OCTOBER 8, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

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HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES
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[fol. 1]

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No. 27211

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY,
and MUNICIPAL SECURITIES COMPANY, INC., Plaintiffs-
Appellees,

against

NEW YORK STOCK EXCHANGE, Defendant-Appellant.

On Appeal from the United States District Court for
the Southern District of New York.

APPENDIX FOR DEFENDANT-APPELLANT AND
APPENDIX FOR PLAINTIFFS-APPELLEES

[fol. 2]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY,
and MUNICIPAL SECURITIES COMPANY, INC., Plaintiffs,

against

NEW YORK STOCK EXCHANGE, Defendant.

COMPLAINT

Plaintiffs, by their attorneys, Bauman, Epstein & Horowitz, as and for their complaint, respectfully allege:

As and for a First Cause of Action:

First—At all times hereinafter mentioned, and since on or about September 1, 1956, plaintiff Harold J. Silver, doing business as Municipal Securities Company, (hereinafter referred to as "Silver") has and has had its principal office in Dallas, Texas.

Second—At all times hereinafter mentioned, and since on or about June 12, 1958, plaintiff Municipal Securities Company, Inc. (hereinafter referred to as "Municipal") was and still is a corporation organized and existing under the laws of the State of Texas.

Third—Upon information and belief, at all times hereinafter mentioned, defendant New York Stock Exchange was and still is an unincorporated association, doing business in the State of New York, with its principal offices at 11 Wall Street, in the City, State and Southern District of New York.

[fol. 3] Fourth—The matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand (\$10,000.00) Dollars.

Fifth—The jurisdiction of this Court is based upon diversity of citizenship, and Title 15, U. S. C. A., Sections 1, *et seq.*

Sixth—At all times hereinafter mentioned, the plaintiff Silver was and still is engaged in the business of purchasing and selling certain types of unlisted securities, principally municipal bonds.

Seventh—In order to properly conduct its business and provide necessary and essential services to its customers, said plaintiff, Silver, required facilities by means of which said plaintiff would be able to purchase and sell such securities.

Eighth—To acquire such facilities, Silver, in or about September, 1956, made an agreement with Dallas Union Securities Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., and Rauscher, Pierce & Co., Inc., named as co-conspirators but not as defendants herein, all of which were and

still are member firms of the defendant, New York Stock Exchange, wherein and whereby it was provided that if each of the said member firms named in this paragraph would have installed a private wire connection between its office and the offices of the said plaintiff, Silver, said plaintiff would, in return therefor, transact business interstate with each of said member firms, relative to the purchase and sale of such securities.

Ninth—Shortly thereafter, and pursuant to said agreement with Dallas Union Securities Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., and Rauscher, Pierce & Co., Inc., there were installed on plaintiff's premises private wire connections with each of the said member firms.

Tenth—At all times hereinafter mentioned, the plaintiff Municipal was and still is engaged in the business of [fol. 4] purchasing and selling corporate securities, namely corporate stocks and bonds.

Eleventh—In order to properly conduct its business and provide necessary and essential services for itself and its customers, said plaintiff required facilities by means of which said plaintiff Municipal and its customers could be apprised and informed as to the latest quotations of securities listed on the defendant, New York Stock Exchange, and by means of which said plaintiff, Municipal, and its customers could purchase and sell securities listed on said defendant, New York Stock Exchange, on which quotations had been so obtained.

Twelfth—To provide its customers with such facilities, the plaintiff, Municipal, in or about June, 1958, made application to the defendant, New York Stock Exchange, for a continuous stock quotations service supplied by ticker originating on the floor of the defendant, New York Stock Exchange; made an agreement with Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F. Hutton & Co., Dallas Rupe & Son, Inc., Rauscher, Pierce & Co., Inc. and Eppler, Guerin & Turner, named as co-conspirators but not as defendants herein, all of which were and still are member firms of the defendant, New York

Stock Exchange, wherein and whereby it was provided that if each of the said member firms aforementioned in this paragraph would have installed a private wire connection between its offices and those of the plaintiff, Municipal, said plaintiff would, in return therefor, and in behalf of itself and its customers, transact business interstate with each of said member firms relative to the purchase and sale of securities listed on the defendant, New York Stock Exchange; and made an agreement with Straus, Blosser & McDowell, named as a co-conspirator but not as a defendant herein, which was and still is a member firm of the defendant, New York Stock Exchange, wherein and whereby [fol. 5] it was provided that if the said member firm would arrange to have installed a teletype between its offices and those of the plaintiff, plaintiff would, in return therefor, and in behalf of itself and its customers, transact business interstate with said member firm relative to the purchase and sale of securities listed on the defendant, New York Stock Exchange.

Thirteenth—Thereafter, and on or about June 25, 1958, the plaintiff, Municipal, was notified by the defendant, New York Stock Exchange, that its application for continuous stock quotations service supplied by ticker had been approved, and thereafter, there was installed in the offices of the said plaintiff, such stock quotations service.

Fourteenth—Thereafter, in or about July, 1958, and pursuant to the said agreement with the member firms, Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F. Hutton & Co., Dallas, Rupe & Son, Inc., Rauscher, Pierce & Co., Inc., and Eppler, Guerin & Turner, there were installed on the premises of the plaintiff, Municipal, private wire connections with each of the said member firms.

Fifteenth—Thereafter, in or about October, 1958, and pursuant to the said agreement with the member firm, Straus, Blosser & McDowell, there was installed on the premises of the plaintiff, Municipal, a teletype between itself and said member firm.

Sixteenth—Thereafter, and beginning in or about January, 1959, the defendant, New York Stock Exchange, willfully, unlawfully, knowingly, and maliciously confederated, combined, conspired and agreed with Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F. Hutton & Co., Dallas Rupe & Son, Inc., Rauscher, Pierce & Co., Inc., Dallas Union Securities Co., [fol. 6] Inc., Eppler, Guerin & Turner, and Straus, Blosser & McDowell, named as co-conspirators but not as defendants herein, to prevent the plaintiff, Silver, from continuing to have use of the aforesaid private wire connections, by means of which business had been and was being transacted interstate, as hereinbefore alleged; from continuing to have use of the aforesaid stock quotations service, the aforesaid private wire connections, and the aforesaid teletype, by means of all of which business had been and was being transacted interstate, as hereinbefore alleged.

Seventeenth—It was a part of said conspiracy that the defendant, New York Stock Exchange, would induce co-conspirators Dallas Union Securities Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., and Rauscher, Pierce & Co., Inc. to breach their aforesaid agreement with the plaintiff, Silver, providing for private wire connections between the offices of said co-conspirators and said plaintiff.

Eighteenth—It was a further part of said conspiracy that the said co-conspirators having been so induced by the defendant, New York Stock Exchange, to breach their aforesaid agreements with the said plaintiff, Silver, would discontinue and remove said private wire connections with the said plaintiff.

Nineteenth—It was a further part of said conspiracy that the defendant, New York Stock Exchange, would discontinue and remove the stock quotations service with the plaintiff, Municipal.

Twentieth—It was a further part of said conspiracy that the defendant, New York Stock Exchange, would induce the co-conspirators Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F.

Hutton & Co., Dallas Rupe & Son, Inc., Rauscher, Pierce & Co., Inc., Dallas Union Securities Co., Inc., and Eppler, Guerin & Turner, to breach their aforesaid agreements [fol. 7] with the said plaintiff, Municipal, providing for private wire connections between the offices of said co-conspirators and said plaintiff.

Twenty-first—It was a further part of said conspiracy that the co-conspirators Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F. Hutton & Co., Dallas Rupe & Son, Inc., Rauscher, Pierce & Co., Inc., Dallas Union Securities Co., Inc., and Eppler, Guerin & Turner, having been so induced by the defendant, New York Stock Exchange, to breach their aforesaid agreements with the said plaintiff, Municipal, would discontinue and remove said private wire connections with the said plaintiff.

Twenty-second—It was a further part of said conspiracy that the defendant, New York Stock Exchange, would induce the co-conspirator, Straus, Blosser & McDowell, to breach its aforesaid agreement with the plaintiff, Municipal, providing for a teletype between the office of said co-conspirator Straus, Blosser & McDowell, and the office of the said plaintiff.

Twenty-third—It was a further part of said conspiracy that the said co-conspirator, having been so induced by the defendant, New York Stock Exchange, to breach its aforesaid agreement with the said plaintiff, Municipal, would discontinue and remove said teletype between the office of said co-conspirator, Straus, Blosser & McDowell, and the office of the said plaintiff.

Twenty-fourth—In pursuance of said conspiracy and for the purpose of carrying out its objects and purposes, in or about February, 1959, the co-conspirators, Dallas Union Securities Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., and Rauscher, Pierce & Co., Inc. did in fact discontinue and remove their aforesaid private wire connections with the plaintiff, Silver; in further pursuance of said conspiracy [fol. 8] and for the purpose of carrying out its objects and

purposes, the defendant, New York Stock Exchange, did in fact discontinue and remove the aforesaid stock quotations service of the plaintiff, Municipal; in further pursuance of the conspiracy and for the purpose of carrying out its objects and purposes, the co-conspirators Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F. Hutton & Co., Dallas Rupe & Son, Inc., Rauscher, Pierce & Co., Inc., and Eppler, Guerin & Turner did in fact discontinue and remove their aforesaid private wire connections with the plaintiff, Municipal; in further pursuance of said conspiracy and for the purpose of carrying out its objects and purposes, the co-conspirators Straus, Blosser & McDowell did in fact discontinue and remove the teletype between itself and the plaintiff, Municipal.

Twenty-fifth—All of the aforesaid acts of the defendant and said co-conspirators were done maliciously, willfully, knowingly, unlawfully and without just cause or provocation, with the unlawful and illegal intent, purpose and object of restraining and preventing plaintiffs from exercising an essential and necessary part of their lawful trade or business in interstate trade or commerce; preventing the plaintiffs from rendering to its customers in interstate trade or commerce, the services necessary and essential for the continuation of the plaintiffs' business, and for the purpose of unlawfully and illegally eliminating said business of plaintiffs in interstate commerce.

Twenty-sixth—All of the aforesaid acts of the defendant were in violation of the provisions of Title 15, U.S. C.A., Sections 1, *et seq.*, and in particular the acts of Congress of July 2, 1890, and October 15, 1914, commonly known as the Sherman Anti-Trust Act, and the Clayton Act, and the subsequent acts of Congress amendatory and supplemental thereto.

[fol. 9] Twenty-seventh—As a result of the wrongful acts of the defendant and the co-conspirators, plaintiffs have sustained great loss and damage which has been inflicted upon them by virtue of the said conspiracy and the acts of the defendant and the said co-conspirators done in pur-

suance thereof; the business, trade and good will of the plaintiffs have been and will continue to be substantially curtailed, impaired, interfered with, and damaged; unless the defendant and the said co-conspirators are properly restrained, the plaintiffs will be unlawfully restricted and prevented from the lawful conduct of their business interstate; the plaintiffs have lost customers, patronage and trade and have been prevented and deterred from continuing and expanding and increasing their businesses as they otherwise would have done; and the said defendant and said co-conspirators intended that plaintiffs should be damaged, put to expense and lose customers, trade and profits as a result of their acts.

Twenty-eighth—As a result of the aforesaid acts, the plaintiff Silver has sustained damages in the amount of Five Hundred Thousand (\$500,000.00) Dollars, and is entitled to recover under the acts of Congress of July 2, 1890 and October 15, 1914, commonly known as the Sherman Anti-Trust Act and the Clayton Act, threefold the amount of said damages, to wit: One Million, Five Hundred Thousand (\$1,500,000.00) Dollars.

Twenty-ninth—As a result of the aforesaid acts, the plaintiff Municipal has sustained damages in the amount of Five Hundred Thousand (\$500,000.00) Dollars, and is entitled to recover under the acts of Congress of July 2, 1890 and October 15, 1914, commonly known as the Sherman Anti-Trust Act and the Clayton Act, threefold the amount of said damages, to wit: One Million, Five Hundred Thousand (\$1,500,000.00) Dollars.

Thirtieth—The acts of the defendant and said co-conspirators herein are continuing and the defendant and said [fol. 10] co-conspirators threaten to continue to commit such acts in the future, all of which will cause the plaintiffs to continue to suffer substantial and irreparable harm and damage; and unless this Court restrain the defendant and said co-conspirators from the continuance of the said wrongful and unlawful acts, the plaintiffs will be without remedy and they will suffer the loss of their investment in their said businesses and an action at law for damages

will not avail them and the plaintiffs will be compelled to bring a multiplicity of suits.

Thirty-first—The plaintiffs are without any adequate remedy at law.

Thirty-second—That the plaintiffs are entitled to reasonable attorneys' fees.

As and for a Second Cause of Action:

Thirty-third—Plaintiffs repeat, reiterate and reallege each and every allegation contained in paragraphs First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth of the complaint hereof with the same force and effect as though fully set forth and repeated herein.

Thirty-fourth—At all times hereinafter mentioned the defendant, New York Stock Exchange, had due notice and knowledge (a) of the contracts, as alleged in paragraph Eighth herein, between Silver and the member firms, Dallas Union Securities Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., and Rauscher, Pierce & Co., Inc., providing for private wire connections between Silver and each of said member firms; ~~of the member firms of the defendant~~ (b) of the contracts, as alleged in paragraph Twelfth herein, between Municipal and the member firms, Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F. Hutton & Co., Dallas Rupe & Son, Inc., Rauscher, [fol. 11] Pierce & Co., Inc., and Eppler, Guerin & Turner, providing for private wire connections between Municipal and each of said member firms; and (c) of the contract, as alleged in paragraph Twelfth herein between Municipal and the member firm, Straus, Blosser & McDowell, providing for the teletype service between Municipal and said member firm.

Thirty-fifth—Notwithstanding the fact that the defendant had due knowledge and notice of all of the said contracts between the plaintiffs and said member firms, the defendant unlawfully, willfully, knowingly, wrongfully, intentionally, maliciously, arbitrarily and without reason-

able cause or justification or excuse, induced, persuaded and enticed all of the said member firms, named herein as co-conspirators, to violate, repudiate and break the said agreements with the plaintiffs and to refuse to proceed or perform further thereunder.

Thirty-sixth—That by reason of the fact that the said member firms were induced to violate, repudiate and break their said agreements, as aforesaid, the plaintiffs have sustained great loss and damage; have been and will continue to have their business, trade and good will substantially curtailed, impaired, interfered with, and damaged; have been unlawfully restricted and prevented from the lawful conduct of their businesses interstate, and have lost customers, patronage and trade.

Thirty-seventh—As a result of the aforesaid acts, the plaintiff Silver has sustained damages in the amount of Five Hundred Thousand (\$500,000.00) Dollars.

Thirty-eighth—As a result of the aforesaid acts, the plaintiff Municipal has sustained damages in the amount of Five Hundred Thousand (\$500,000.00) Dollars.

As and for a Third Cause of Action:

Thirty-ninth—Plaintiffs repeat, reiterate, and reallege each and every allegation contained in paragraphs First, [fol. 12] Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Thirty-fourth and Thirty-fifth of the complaint hereof with the same force and effect as though fully set forth and repeated herein.

Fortieth—That the defendant, in inducing the member firms, Dallas Union Securities Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., and Rauscher, Pierce & Co., Inc., to breach their contracts with plaintiff, Silver; in inducing the member firms, Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F. Hutton & Co., Dallas Rupe & Son, Inc., Rauscher, Pierce & Co., Inc., and Eppler, Guerin & Turner to breach their contracts with

the plaintiff, Municipal; in inducing the member firm, Straus, Blosser & McDowell to breach its contract with the plaintiff, Municipal, and in removing the stock quotation service between itself and the plaintiff, Municipal, acted unlawfully, willfully, knowingly, wrongfully, intentionally, maliciously, arbitrarily, and without reasonable cause, justification or excuse, and with intent to injure the plaintiffs.

Forty-first—Said wrongful acts of the defendant have seriously impaired the vested property rights of the plaintiffs, were calculated to and did cause grief and irreparable harm to plaintiffs, have and will continue to curtail, impair, interfere with, and damage, plaintiffs' trade, businesses and good will; have and will continue unlawfully to restrict and prevent plaintiffs from the lawful conduct of their businesses; have caused and will continue to cause plaintiffs to lose customers, patronage and trade.

Forty-second—As a result of the aforesaid acts, the plaintiff Silver has sustained damages in the amount of Five Hundred Thousand (\$500,000.00) Dollars.

Forty-third—As a result of the aforesaid acts, the plaintiff Municipal has sustained damages in the amount of Five Hundred Thousand (\$500,000.00) Dollars.

[fol. 13] Wherefore, the plaintiffs demand judgment:

(1) That the defendant and the agents and officers of each of them and all persons combining with or acting in concert with them or under their direction be perpetually and during the pendency of this action restrained and enjoined from conspiracy and combining to interfere with the free exercise by plaintiffs of their businesses.

(2) That the defendant, New York Stock Exchange, be ordered perpetually and during the pendency of this action to have reinstated plaintiffs' stock quotations service.

(3) That the defendant be restrained and enjoined perpetually and during the pendency of this action from in any way urging, advising, inducing, coercing, or by any act, device, or method, persuading any persons or parties from interfering with plaintiffs' use of the private wire

connections and teletype services with the said member firms, as herein alleged.

(4) On the first cause of action, plaintiff, Silver, demands judgment against the defendant in the sum of One Million, Five Hundred Thousand (\$1,500,000.00) Dollars, the same being threefold the damages by it sustained, together with reasonable attorneys' fees, and the plaintiff, Municipal, demands judgment against the defendant in the sum of One Million, Five Hundred Thousand (\$1,500,000.00) Dollars, the same being threefold the damages by it sustained, together with reasonable attorneys' fees.

(5) On the second cause of action, the plaintiff, Silver, demands judgment against the defendant in the sum of Five Hundred Thousand (\$500,000.00) Dollars, and the plaintiff, Municipal, demands judgment against the defendant in the sum of Five Hundred Thousand (\$500,000.00) Dollars.

[fol. 14] (6) On the third cause of action, the plaintiff, Silver, demands judgment against the defendant in the sum of Five Hundred Thousand (\$500,000.00) Dollars, and the plaintiff, Municipal, demands judgment against the defendant in the sum of Five Hundred Thousand (\$500,000.00) Dollars.

(7) That plaintiffs have such other and further relief as to this Honorable Court may seem just and proper in the premises, together with the costs and disbursements of this action.

Bauman, Epstein & Horowitz, By Arnold Bauman,
Partner, Attorneys for Plaintiffs, Office & P. O.
Address, 640 Fifth Avenue, New York 19, New
York.

(Verified by Arnold Bauman, April 3, 1959.)

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANSWER

Defendant, by Milbank, Tweed, Hope & Hadley, its attorneys, for answer to the complaint:

1. Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every [fol. 15] allegation contained in paragraphs First and Second, except it was informed on or about June 13, 1958, and believes and therefore admits that Municipal Securities Company, Inc., (herein called "Municipal") was a corporation organized and existing under the laws of the State of Texas.

2. Denies each and every allegation contained in paragraphs Fourth and Fifth, except it admits that the jurisdiction of the Court is attempted to be based upon the grounds and statutes referred to therein.

3. Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh, except it admits that in September, 1956, Merrill Lynch, Pierce, Fenner & Smith, Inc., and Rauscher, Pierce & Co., Inc., were and still are member firms of defendant and that Municipal in its application to defendant for private wire connections dated June 13, 1958; stated it was a general securities dealer.

4. Denies that it has any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs Twelfth, Thirteenth, Fourteenth and Fifteenth, except it admits that during June and July, 1958, Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Company, E. F. Hutton & Company, Dallas, Rupe & Son, Inc., Rauscher, Pierce & Co. Inc., and Eppler, Guerin & Turner, Inc., were and still are member firms of defendant; that, with the exception of Merrill Lynch, Pierce, Fenner & Smith, Inc., each re-

requested defendant's permission to establish a private wire connection with Municipal; that by written application dated June 13, 1958, Municipal applied to defendant for approval of private wire connections with each of them; that defendant gave temporary approval to the requests [fol. 16] of the member firms and to the application of Municipal; that in October, 1958, Straus, Blosser & McDowell, a member firm of defendant, requested defendant to grant them permission to install a private wire over Western Union facilities to Municipal and defendant granted temporary approval to such request; that by application dated June 23, 1958, Municipal applied to defendant for continuous quotations of defendant and on June 25, 1958, defendant granted Municipal temporary approval thereof.

5. Denies each and every allegation contained in paragraphs Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, Twenty-fourth, Twenty-fifth, Twenty-sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth, Thirtieth, Thirty-first, Thirty-second, Thirty-fourth, Thirty-fifth, Thirty-sixth, Thirty-seventh, Thirty-eighth, Fortieth, Forty-first, Forty-second and Forty-third.

And for a first, separate and complete defense to each cause of action, defendant alleges:

6. This Court is without jurisdiction over the subject matter in that diversity of citizenship is lacking as to each cause of action, in that none of the causes of action involves a dispute or controversy respecting the validity, construction or effect of the laws of the United States upon the determination of which the result depends, and in that each cause of action is separate and distinct from the other causes of action.

Milbank, Tweed, Hope & Hadley, By A. Donald MacKinnon (a member of the firm), 15 Broad Street, New York 5, New York, Attorneys for Defendant.

[fol. 17]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND
PRELIMINARY INJUNCTION—April 26, 1960

Pursuant to Rule 56(a) and (c) of the Federal Rules of Civil Procedure, plaintiffs move for partial summary judgment under section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. §26, permanently enjoining and restraining defendant New York Stock Exchange from in any manner: (1) preventing, prohibiting or attempting to prevent or prohibit the maintenance and operation of private wire connections between plaintiffs and defendant's member firms; (2) coercing, compelling or attempting to coerce or compel its member firms from exercising a right of individual action concerning the maintenance and operation of private wire connections between plaintiffs and said member firms; (3) enforcing or threatening to enforce the several provisions of its Constitution and Rules, through which, by threat of disciplinary proceedings or imposition of other sanctions, defendant restrains, and is authorized to restrain arbitrarily, the exercise of a member firm's right of independent action concerning the maintenance and operation of private wire connections; and (4) refusing and continuing to refuse to furnish plaintiff Municipal Securities Company, Inc. (hereinafter referred to as "MSC, INC") continuous stock quotations service and, at the same time, provide and continue to provide such service to MSC, INC's competitors in the relevant over-the-counter corporate securities market on the ground that there is no genuine issue as to any material fact and plaintiffs are entitled to judgment as a matter of law on the first cause of action set forth in their complaint (alleging a violation [fol. 18] of the Federal anti-trust laws), except with respect to the amount of damages.

In the event that the aforesaid motion for partial summary judgment is denied, plaintiffs will request that this Court: (1) enter an order in accordance with Rule 56(d) of the Federal Rules of Civil Procedure, specifying the

facts that appear without substantial controversy; (2) certify that the order denying summary judgment is appropriate for immediate appeal to the Court of Appeals in accordance with section 1292(b) of Title 28, United States Code; and (3) grant such other, further, or different relief as may seem just and proper.

In addition thereto, plaintiff Harold J. Silver, d/b/a Municipal Securities Company (hereinafter referred to as "MSC"), moves this Court pursuant to Rule 65(a) of the Federal Rules of Civil Procedure for an order enjoining and restraining defendant New York Stock Exchange from in any manner: (1) preventing, prohibiting or attempting to prevent or prohibit the maintenance and operation of private wire connections between plaintiff MSC and defendant's member firms; (2) coercing, compelling or attempting to coerce or compel its member firms from exercising a right of individual action concerning the maintenance and operation of private wire connections between plaintiff MSC and said member firms; and (3) enforcing or threatening to enforce the several provisions of its Constitution and Rules, through which, by threat of disciplinary proceedings or imposition of other sanctions, defendant restrains, and is authorized to restrain arbitrarily, the exercise of a member firm's right of individual action concerning the maintenance and operation of private wire connections.

As further grounds for the relief herein requested, plaintiffs refer this Court to the affidavits and exhibits [fol. 19] hereto annexed and the pleadings, affidavits and depositions heretofore taken in this cause.

Dated: April 26, 1960.

Dickstein, Shapiro & Galligan, By Sidney Dickstein,
A Member of the Firm, 20 East 46th Street, New
York 17, New York.

Goldberg, Fonville, Gump & Strauss, By Robert S.
Strauss, A Member of the Firm, 2232 Republic
National Bank Building, Dallas 1, Texas.

Attorneys for Plaintiffs.

David I. Shapiro, 1411 K Street, N. W., Washington 5,
D. C., Of Counsel.

[fol. 20]

NOTICE OF MOTION

To: Milbank, Tweed, Hope & Hadley, Esqs., Attorneys
for Defendant:

Please Take Notice that the undersigned will bring the above motions on for hearing before this Honorable Court at Room 506, United States Courthouse, Foley Square, New York, New York, on the 10th day of May, 1960, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dickstein, Shapiro & Galligan, By Sidney Dickstein,
A Member of the Firm, 20 East 46th Street, New
York 17, New York, Attorneys for Plaintiffs.

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF HAROLD J. SILVER.

State of Texas,
County of Dallas, ss.:

Harold J. Silver, being duly sworn, deposes and says:

I am the sole proprietor of plaintiff Municipal Securities Company and president and sole stockholder of plaintiff Municipal Securities Company, Inc. I submit this affidavit in support of the motions of plaintiffs herein.

[fol. 21] Introduction.

Plaintiff Municipal Securities Company (hereinafter referred to as "MSC" or the "proprietorship") is a sole proprietorship registered to do business under that name in accordance with the laws of the State of Texas and having an office for the doing of business in the City of Dallas, Texas. MSC is engaged exclusively in the securities business. Virtually all of its activities are concerned with transactions in securities known as municipal bonds.

Plaintiff Municipal Securities Company, Inc. (hereinafter referred to as "MSC, INC." or the "corporation") is a corporation organized and existing under the laws of the State of Texas and has its principal office in the City of Dallas, Texas. Formerly, MSC, INC. was actively engaged in the securities business in the over-the-counter corporate securities market. For reasons which will subsequently appear, MSC, INC. is no longer actively engaged in this business, despite the fact that it has retained its corporate existence.

Defendant New York Stock Exchange (hereinafter referred to as "NYSE" or the "Exchange") is an unincorporated association doing business in the State of New York, with its principal office located at 11 Wall Street, New York City. The Exchange has 1,375 members and is authorized to have an unlimited number of allied members. An "allied member" is a general partner in a member firm doing business as a partnership or an owner of voting stock in a member corporation. A "member firm" is a firm transacting business as a broker or dealer in securities at least one of whose general partners is a member of the Exchange. A "member corporation" is a corporation transacting business as broker or dealer in securities, which has one or more directors who are members of the Exchange. I am informed that the object and purpose of the Exchange is to provide facilities for its members to transact business in securities listed for trading and traded on the Exchange.

[fol. 22] The complaint states three causes of action. The first alleges that in January, 1959 the NYSE entered into a conspiracy in violation of the Federal Anti-Trust Laws with certain of its designated member-firms to prevent plaintiffs from continuing to have the use of NYSE's continuous stock quotation service and to prevent plaintiffs from having private wire connections with said member-firms. The second alleges that the Exchange tortiously induced its member-firms to breach their contracts for wire connections with plaintiffs. The third alleges the commission of the tort of intentional and wrongful harm without reasonable cause therefor. The instant motions for preliminary injunction and partial summary judgment are

directed solely to the defendant's alleged violations of the anti-trust laws as set forth in the first cause of action.

Description of Motions.

In the first instance, plaintiffs move for partial summary judgment restraining defendant New York Stock Exchange from, in any manner: (1) preventing, prohibiting or attempting to prevent or prohibit the maintenance and operation of private wire connections between plaintiffs and defendant's member-firms; (2) coercing, compelling or attempting to coerce or compel its member-firms from exercising a right of individual action concerning the maintenance and operation of private wire connections between plaintiffs and said member-firms; (3) enforcing or threatening to enforce the several provisions of its Constitution and Rules, through which, by threat of disciplinary proceedings or imposition of other sanctions, defendant restrains, and is authorized to restrain arbitrarily, the exercise of a member-firm's right of individual action concerning the maintenance and operation of private wire connections; and (4) refusing and continuing to refuse to furnish plaintiff MSC, INC. continuous stock quotation service and, at the same time, provide and continue to provide such service [fol. 23] to MSC, INC.'s competitors (which include both member-firms as well as non-member firms) in the relevant over-the-counter corporate securities market on the ground that there is no genuine issue as to any material fact and plaintiffs are entitled to judgment as a matter of law on the first cause of action, except with respect to the amount of damages.

In the event this motion for partial summary judgment is denied, plaintiffs request that this Court: (1) enter an order in accordance with Rule 56(d) of the Federal Rules of Civil Procedure, specifying the facts that appear without substantial controversy and (2) certify that such order is appropriate for immediate appeal to the Court of Appeals in accordance with Section 1292(b) of Title 28, United States Code.

At the same time and independently of the motion for partial summary judgment, plaintiff MSC moves for pre-

liminary injunctive relief pursuant to Rule 65(a) of the Federal Rules of Civil Procedure.

Organization of Municipal Securities Company.

On August 12, 1955, I formed Intercontinental Securities Company, a sole proprietorship, for the purpose of engaging in the securities business. On that day the name "Intercontinental Securities Company" was registered in Dallas County, Texas (the name and style, Municipal Securities Company, under which this suit is brought, is essentially the same business, the change of name having been effected on September 10, 1956). On August 12, 1955, I applied for a license as an Individual Securities Dealer or Broker to the Securities Division, Office of the Secretary of State, State of Texas. My application was approved and a license issued effective August 16, 1955.

My first office was located at 507 Meadows Building, Dallas. At the time the business was formed and for some time thereafter I had no employees, the business being conducted entirely by me. On November 8, 1955, I filed an [fol. 24] application with the Securities and Exchange Commission (SEC) for registration as a broker-dealer. This registration was granted effective December 9, 1955. A copy of the letter of registration is annexed hereto as Exhibit 1.

On November 9, 1955, I applied for membership in the National Association of Securities Dealers, Inc. (NASD). The NASD is a national securities association organized pursuant to Section 15A of the Securities Exchange Act of 1934, as amended. The Board of Governors of the NASD is empowered to adopt and has adopted a Uniform Practice Code which governs the activities between NASD members in dealing in over-the-counter transactions unless the parties make specific agreement otherwise. I was admitted to membership in the NASD on January 10, 1956. A copy of my letter of admission is annexed hereto as Exhibit 2.

The proprietorship was formed with an initial capitalization of \$25,000. During the balance of 1955 I made additional contributions to capital in the amount of \$735,000.

The business of the proprietorship consisted almost in its entirety of buying, selling, and underwriting municipal

bonds. The total dollar volume of transactions by the proprietorship in 1955 was \$797,521.77. During the year 1956 the proprietorship participated in the underwriting of the following municipal issues, among others: Aldine, I. S. D.; Brazoria County, R. D. No. 33, Nederland I. S. D.; City of Pampa, G. O. The total dollar volume of proprietorship transactions in 1956 was \$7,892,410.18.

During the year 1957 the proprietorship acted as manager or co-manager of the following municipal underwritings: Big Spring, G. O.; Frionia, I. S. D.; Garland, I. S. D.; City of Grand Prairie, G. O.; Howard County, C. S. D. No. 6; Pettit, I. S. D.; Petersburg, I. S. D.; Smyer, I. S. D.; Sterling City, G. O. Bonds; Sterling City Revenue; Terry County Airport; and in addition participated in the underwriting of the following municipal issues: City of Amarillo, G. O.; Blackwell, R. H. S. D.; Calhoun County, P. E.; Friendship, R. H. S. D.; Fort Worth, I. S. D.; Gainesville, [fol. 25] I. S. D.; Garland Electric W. & S. S. Revenue; Houston, I. S. D. Bonds; Hardin County Ctse. & Jail; City of Houston, Water Revenue; City of Houston, G. O.; Port Arthur, I. S. D.; State of North Dakota G. O.; State of South Carolina Highway; Stinnett, I. S. D.; Temple Water & Sewer Revenue. The total dollar volume of proprietorship transactions in 1957 was \$20,044,661.07.

During the year 1958 the proprietorship acted as manager or co-manager of municipal underwritings such as: Town of Allen Revenue; Bedford, C. S. D. No. 33; Bynum, I. S. D.; Cameron County, Road Bonds; Carney, R. H. S. D.; Cleveland, I. S. D.; and others. In addition, MSC participated in the underwriting of the municipal issues such as: Board of Regents, University of Texas; City of Aransas Pass, G. O.; Austin, I. S. D.; City of Austin, Revenue, Birdville, I. S. D.; Corpus Christi, G. O.; and others. The total dollar volume of proprietorship transactions in 1958 was \$54,607,729.22.

During the year 1959 the proprietorship acted as manager or co-manager of municipal underwritings such as: City of Abernathy, G. O.; Anderson Co., C. S. D. No. 3; Atascaso County, R. D. No. 3A Refunding; City of Booker, G. O.; City of Booker, Revenue; Bridgeport, I. S. D.; and

X

others. In addition, MSC participated in the underwriting of the following municipal issues: Abernathy, I. S. D.; Abilene, I. S. D.; City of Abilene, G. O.; City of Alpine, G. O.; Amarillo Jr. College District; City of Andrews, Revenue; Archer County Hospitals; City of Beaumont, G. O.; Bexar County Jail Bonds; Borden County, I. S. D.; Central, I. S. D.; City of Dallas, W. W. & San. S. S. Revenue; City of Freeport, Revenue; City of Freeport, G. O.; Hall County Hospital; Hidalgo County, R. D. No. 11; Hurst Euless Cons., I. S. D.; Hurst Euless Cons., I. S. D.; Killeen, I. S. D.; Lamesa, I. S. D.; State of New Jersey; Nederland Water & Sewer Tax Bonds; New Caney, I. S. D.; State of New Jersey; North East, I. S. D.; Nueces County Navigation Dist. No. 1; Post Cons., I. S. D.; Robinson, I. S. D.; [fol. 26] West Texas State College Stadium Rev.; Anderson County, C. S. D. No. 7; Bexar Co., W. C. I. D. #16; Bexar Co., W. C. I. D. #17; Town of Shellytown, G. O. The total dollar volume of proprietorship transactions in 1959 was \$31,762,532.07.

From the commencement of business in August, 1955 until August, 1956 the proprietorship enjoyed a slow, but steady growth. In August, 1956, I employed Mr. D. Edward Walton as Manager. Mr. Walton had had many years experience in the handling of municipal bond transactions while employed with various banks and securities houses in the State of Texas. Shortly after his employment, the name of the proprietorship was changed to Municipal Securities Company and the proprietorship moved to new and expanded offices in the First National Bank Building in Dallas. All appropriate agencies and organizations were advised of the change of name and address and Mr. Walton was registered as an MSC Representative with the NASD.

After Mr. Walton's employment by MSC, the business was further expanded. On or about September 1, 1956, direct private telephone wires were installed between the office of MSC and the municipal bond departments in the Dallas offices of both Merrill Lynch, Pierce, Fenner & Beane and Rauscher, Pierce & Company, member-firms of the Exchange, and also with the First Southwest Co., a non-member. Direct private wires were also installed to the

bond departments of the First National Bank, the Republic National Bank and the Mercantile National Bank. With the installation of these private wires, MSC was equipped to engage in a trading business in municipal bonds. (In May, 1958, an additional direct wire was installed between MSC's office and the office of the Dallas Union Securities Company). Mr. Edward Jilek was hired to act as a municipal bond trader on September 15, 1956.

On March 15, 1957, MSC opened an additional office in Lubbock, Texas. In January, 1958, another office was opened in San Antonio, Texas. On August 25, 1958, MSC [fol. 27] opened another branch in Longview, and on January 1, 1959 still another in Amarillo. As MSC's business increased there was, of course, a need for additional employees. The average monthly payroll for the last four months of 1956 was approximately \$3,250.00. The average monthly payroll for 1957 was approximately \$4,700.00. The average monthly payroll for the year 1958 was approximately \$8,250.00. At the end of 1956 the proprietorship had 5 employees, at the end of 1957 it had 8 employees, and by the end of 1958 it had 16 employees.

The Organization and Growth of Municipal Securities Company, Inc.

In 1958, with MSC's municipal bond business well under way, I began to think in terms of organizing a division or department within MSC, the sole function of which would be to engage in corporate securities transactions. My plans in this direction materialized in early June, 1958 when I was introduced to Harry F. Reed. Mr. Reed had been employed in the securities business in various capacities since 1926 and had substantial experience as a "trader" with various securities houses in the City of Dallas. Arrangements were made for the formation of a corporation to be concerned primarily with corporate securities transactions in the over-the-counter securities market and for Mr. Reed's employment by the corporation as a corporate securities trader under a salary and profit-sharing arrangement.

On June 12, 1958 MSC, Inc. was duly incorporated in the State of Texas. The officers of the corporation were myself, as president and director, D. Edward Walton, vice president and director, and my wife, Evelyn B. Silver, secretary-treasurer and director. My wife's position in the corporation was that of a nominal officer since she played no active role in the business. All of the stock of MSC, Inc. was and still is owned by me.

[fol. 28] On June 13, 1958, MSC, Inc. applied to the Securities and Exchange Commission (SEC) for registration as a broker-dealer in accordance with Section 15 of the Securities Exchange Act of 1934 as amended. Registration became effective June 27, 1958. A copy of this letter of registration is annexed hereto as Exhibit 3. On June 13, 1958, MSC, INC. applied to the State Securities Board, State of Texas for a license as a General Securities Dealer. This license was issued July 2, 1958. On June 18, 1958, MSC, INC. applied for membership in the NASD and on July 1, 1958 the application was approved by the NASD's Board of Governors.

On June 13, 1958, Mr. Reed prepared (and I executed) an application to the NYSE for private wire connections and a form entitled "Information To Be Furnished By Non-Member For Private Wire Connections Or Ticker Service," copies of which are annexed hereto as Exhibits 4 and 5, respectively. Since Mr. Reed was familiar with the NYSE's requirements for stock ticker service and private wire connections, the appropriate arrangements were made by him. The application forms were sent to the NYSE on the date of their execution. The application for private wire connections listed the offices of Rauscher, Pierce & Co.; Dallas Rupe & Son; Eppler, Guerin & Turner; Merrill Lynch, Pierce, Fenner & Smith; Sanders & Co.; Harris Upham & Co.; Goodbody & Co.; E. F. Hutton & Co. and Schneider, Bernet & Hickman as the NYSE member firms with whom MSC, INC.'s office would be connected by private wire.

On June 2, 1958, E. F. Hutton & Co. made a letter application to the NYSE for a private wire connection with MSC, INC. A copy of this letter is annexed hereto as Exhibit 6. Similar applications were made by Dallas, Rupe

& Son, Inc. on the same day; Sanders & Company on June 10, 1958; Harris, Upham & Co. on June 16, 1958; Goodbody & Co. on June 17, 1958; Schneider, Bernet & Hickman, Inc. [fol. 29] on June 24, 1958; Rauscher, Pierce & Co., Inc. on June 26, 1958; and Eppler, Guerin & Turner, Inc. on June 26, 1958. Copies of the foregoing letter applications are annexed hereto as Exhibits 7, 8, 9, 10, 11, 12 and 13 respectively. Apparently, no letter application was ever made by Merrill Lynch, Pierce, Fenner & Smith, although I am now informed that under the NYSE's Constitution and Rules it should have done so prior to establishing a private wire connection between its office and that of a non-member firm. I am also informed that "temporary approvals" of those private wire connections for which proper application had been made were granted by the NYSE at various times during the period June 18, 1958 through August 13, 1958.

On June 23, 1958 MSC, INC. mailed to the NYSE an "Agreement for Continuous Quotations of the New York Stock Exchange" (stock ticker service). A copy of this agreement is annexed hereto as Exhibit 14. On June 25, 1958, the NYSE advised MSC, INC. that its "application for continuous stock quotations service had been temporarily approved, pending further processing." A copy of the letter of June 25, 1958 is annexed hereto as Exhibit 15. Actual installation of the stock ticker was made by Western Union Telegraph Company on July 8, 1958. The Exchange billed MSC, INC. directly at an initial rate of \$102.60 per month. All bills rendered were promptly paid.

Private wire connections to the trading desks of the above-mentioned firms were installed soon thereafter. Private wire connections were also made with Shumate & Co.; First Southwest Co.; Midland Securities Co.; Parker, Ford & Co. and Dallas Union Securities Company. None of these were member firms of the NYSE, but Dallas Union Securities Company became one in the latter part of 1958 or early 1959. The private wire connections, both with member and non-member firms, were installed between the office of MSC, INC. and the corporate securities trading departments of these firms located in Dallas.

[fol. 30] Once these connections were installed MSC, INC. was able to have virtually instantaneous communication with the corporate trading departments of the securities houses with which MSC, INC. had private wires. Merely by flicking the keys of the wire turret MSC, INC.'s trader was enabled to obtain and give requests for bid and offering price quotations and other market information. It was possible in a matter of seconds to obtain from each of the houses with which MSC, INC. was connected their quotations on over-the-counter corporate securities in which MSC, INC. was interested. Moreover, these houses could make similar requests for MSC, INC.'s quotations on particular issues. With these facilities MSC, INC. was able for its own account and for the account of its customers to buy particular corporate securities at the lowest quoted price and to sell securities at the highest quoted price. Moreover, through the direct wire connections and the almost instantaneous communication provided by these connections, MSC, INC. was enabled to keep in constant touch with the trend and fluctuations in particular issues.

For the period July, 1958 through February, 1959 the greatest portion of MSC, INC.'s transactions were in over-the-counter securities, primarily of local corporations. It actively traded such securities as the common stock of Ling Altec, Pan American Sulphur, Gulf Sulphur, Delhi-Taylor, Gulf Interstate Co., Canadian-Delhi, Midwestern Instruments, Dallas Oil, Levine's, Neiman-Marcus, Texas Industries, Electro Refractories, Jefferson Lake Petrochemicals, Vocaline, Texas Natural Gas, American Dryer, Baltimore Paint, Frito Co. and San Jacinto Petroleum.

During the period July, 1958 through September, 1959 MSC, INC. executed buy and sell orders for customers in securities listed on the New York Stock Exchange in a total volume of approximately \$700,000.00. This was less than 3% of MSC, INC.'s total business for the same period. MSC, INC. received no commissions or fees of any kind [fol. 31] for this business, commissions being earned only by the member firm who executed such order at MSC, INC.'s request. When MSC, INC. took orders to buy or sell securities listed on the New York Stock Exchange it did so only as a customer accommodation or service.

In October, 1958 MSC, INC. made arrangements with Straus, Blosser & McDowell (a member-firm of the NYSE) for a direct Western Union Telemeter connection to that firm's office in New York City. On October 13, 1958, Straus, Blosser & McDowell made letter application to the NYSE for permission to establish such connection. A copy of the letter application is annexed hereto as Exhibit 16. The Exchange approved this application on October 15, 1958, and the installation was completed soon thereafter. This telemeter (teletype) connection was used both by MSC, INC. and Straus, Blosser & McDowell for obtaining quotations on both listed and unlisted securities, creating markets in New York and Dallas on selected over-the-counter securities in which MSC, INC. and Straus, Blosser & McDowell were principally active and for general market and statistical information. After the establishment of this connection most customers' orders for the purchase and sale of listed securities (*i.e.*, listed on the NYSE) were handled over this wire and executed by Straus, Blosser & McDowell.

MSC, INC. started business with an original capitalization of \$25,000. This sum was augmented shortly after it began activities by an additional \$50,000 in the form of a subordinated loan from myself. I assured MSC, INC. that further capital would be contributed as needed. MSC, INC.'s activities were substantial and profitable. From June 12, 1958 (the date of incorporation) to April 30, 1959 MSC, INC. had a gross profit on trading transactions of \$77,158.63 and net earnings before income tax of \$17,280.12. In addition, it had an unrealized profit on securities in its portfolio in the amount of \$28,927.82.

[fol. 32] Trading activities grew to such proportions that on December 1, 1958 Howard J. Speer was hired as an additional trader. Clerical personnel and sales representatives were also employed. Arrangements were made for the expansion of the Dallas Office, and on December 22, 1958, MSC, INC. entered into a lease for a new office in San Antonio for a one-year term commencing February 1, 1959 at an annual rental of \$4,180.80. The San Antonio office was located in the National Bank of Commerce Building.

By February 1, 1959, MSC, INC. employed a total of 7 persons.

The Withdrawal of Private Wire Connections and Stock Ticker Service.

On February 12, 1959, without prior notice to me or anyone else connected with MSC or MSC, INC. a staff meeting of the Department of Member Firms of defendant, NYSE, was held in New York City. As I have subsequently learned through a deposition taken in this action, one of the items on the agenda of that meeting was the disapproval of MSC and MSC, INC.'s applications for private wire connections and MSC, INC.'s application for continuous stock quotation service. The decision to disapprove these applications was made at that meeting. On that day the NYSE sent letters to those of its member firms who were listed on the NYSE's records as having private wire connections with MSC, INC. stating in part:

"Effective immediately, the Exchange has withdrawn the temporary approval granted your firm * * * . We would appreciate your advising us as soon as this wire has been discontinued."

Copies of the foregoing letters are annexed hereto as Exhibits 17, 18, 19, 20, 21, 22, 23, 24 and 25 (a), (b) and (c). [fol. 33] The first notice received by anyone in my organization of the NYSE's action came through a telephone call from a Mr. Bert Seligman of Straus, Blosser & McDowell. The telephone call was received by Mr. Reed on the morning of February 13, 1959. I was later told by Mr. Reed that Mr. Seligman had read him the letter he had received from the NYSE, after which he (Seligman) told Mr. Reed that in view of that letter, no more communications could be had between MSC, INC. and Straus, Blosser & McDowell over the private telemeter connection. Mr. Reed further apprised me that Mr. Seligman had offered to try to ascertain the reasons for the NYSE's action, but that later in the day Mr. Seligman informed Mr. Reed that while he had discussed the matter with officials of the Exchange they had refused to assign any reasons for their action. At about

noon of that same day a telephone call was received from the Dallas office of E. F. Hutton & Co., the caller reporting to Mr. Reed that they too had received a letter from the NYSE ordering discontinuance of MSC, INC.'s private wire connection with them.

On Monday morning, February 16, 1959, I contacted Mr. E. C. Gray, a vice president of the NYSE, in New York City, and was referred by him to a Mr. W. W. Coleman, a member of the staff of the NYSE's Department of Member Firms. I spoke to Mr. Coleman for about an hour but he would give me no reason for the NYSE's action. Annexed hereto as Exhibit 26 is a memorandum prepared by Mr. Coleman following our conversation. My recollection of this conversation is substantially in accord with the content of Mr. Coleman's memorandum, except I recall apprising him of my transactions with respect to the stock of U. S. Hoffman Machinery Co. in the supposition that a misunderstanding as to the nature of those transactions might have led the NYSE to take the action it did. However, it does not appear that the fact of my reference to transactions in U. S. Hoffman Machinery Co. stock is in any way material [fol. 34] to the instant motions for preliminary injunction and summary judgment.

During the week following my conversation with Mr. Coleman, all other private wire connections between MSC and MSC, INC. and NYSE member firms (except Dallas Union Securities Co., Inc.) were discontinued, whereupon these firms advised the NYSE of their compliance with the Exchange's action of February 12, 1959. Annexed hereto as Exhibits 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36 are letters from these NYSE member firms advising the Exchange of the discontinuance of their respective wire connections with MSC and MSC, INC. (Dallas Union Securities Co., Inc., which I believe became an NYSE member-firm in late 1958 or early 1959, did not receive a communication from the NYSE respecting its wire connection with MSC, INC. until February 24, 1959. Annexed hereto as Exhibit 37 is the letter of February 24, 1959. In response to this letter, Dallas Union Securities Co., Inc. advised the NYSE by letter dated March 2, 1959, a copy of which is annexed

hereto as Exhibit 38, that its private wire connection with MSC, INC. had been disconnected.)

On February 16, 1959, MSC, INC. received a letter directly from the NYSE advising that its temporary approval for stock ticker service had been withdrawn and that service would be discontinued as of February 18, 1959. A copy of the NYSE's letter dated February 13, 1959 is annexed hereto as Exhibit 39. The stock ticker service was disconnected by Western Union Telegraph Company on February 18, 1959.

Parenthetically, it should be noted that in addition to the wire between MSC, INC. and Rauscher, Pierce & Co.'s corporate securities trading department MSC had a direct wire to Rauscher, Pierce & Co.'s municipal bond department. Accordingly, Mr. Walton of MSC telephoned Mr. Taylor Almon of Rauscher, Pierce & Co.'s municipal bond department and inquired whether the NYSE's letter direct-[fol. 35] ing the removal of the private wire connections referred not only to Rauscher, Pierce & Co.'s corporate securities trading department wire to MSC, INC. but to its municipal bond department wire to MSC as well. Mr. Walton was advised that John Rauscher, Jr. had specifically inquired about this matter and was informed by the NYSE that it applied to Rauscher, Pierce & Co.'s municipal bond department wire to MSC also.

On February 26, 1959 I addressed a letter to Mr. G. Keith Funston and Mr. Edward C. Werle, who are respectively President and Chairman of the Board of Governors of the NYSE. In that letter, a copy of which is annexed hereto as Exhibit 40, I requested "(1) Temporary reinstatement of the services, (2) that we be advised of the reasons for the action of the New York Stock Exchange, and (3) that we be given an opportunity to answer any charges and present whatever information you may require." I received a letter of response from Mr. Funston dated March 4, 1959 and a letter of response from Mr. Werle dated March 9, 1959. Both Mr. Funston and Mr. Werle declined to furnish any reason for the NYSE's action. Copies of these letters are annexed hereto as Exhibits 41 and 42 respectively.

Meanwhile (following up on Mr. Coleman's suggestion that, if I determined to seek reconsideration, I support this request by qualitative letters of reference) I obtained letters of recommendation from Sanders & Company; Straus, Blosser & McDowell; Eppler, Guerin & Turner, Inc.; Rauscher, Pierce & Co., Inc.; Cady, Roberts & Company; Mercantile National Bank at Dallas; First National Bank in Dallas; Republic National Bank of Dallas; Texas Bank & Trust Company of Dallas; The Chase Manhattan Bank; Chemical Corn Exchange Bank and Bankers Trust Company. Copies of these letters are annexed hereto as Exhibits 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 54. Eppler, Guerin & Turner, Inc. and Cady, Roberts & Co. originally [fol. 36] had filed letters of recommendation in support of the application of MSC, INC. for stock ticker service. I turned these letters over to Mr. Leon of the New York law firm of Leon, Weill & Mahoney and was subsequently advised that they had been exhibited to Mr. Frank J. Coyle, vice-president of the NYSE in charge of the Department of Member Firms, during the course of an interview on March 23, 1959.

The Effect and Consequences of Disapproval on MSC, INC.

As a result of the discontinuance of the private wire connections with the NYSE's member firms, MSC, INC. was unable to communicate rapidly with those securities houses in Dallas doing the bulk of the over-the-counter corporate securities business. While private wire connections to firms who were not NYSE members were not discontinued, those firms either had no corporate securities trading department or rarely traded in those securities actively traded in by MSC, INC. The corporation did attempt to communicate with the trading departments of these NYSE member firms in Dallas to obtain quotations and seek other information through conventional telephonic means, but this took an average time period measurable in minutes (rather than seconds, as in the case of a private wire).

This time differential placed MSC, INC. at a disadvantage in its trading activities, for while other firms heavily engaged in over-the-counter corporate securities trading could obtain information from one another almost instantaneously, MSC, INC. was relegated to a slower and secondary means of communication. In a rapid market movement, MSC, INC. could be and was the victim of information which, by the time it could be obtained and acted upon, was already obsolete and inaccurate. Moreover, trading [fol. 37] departments of the NYSE member firms would rarely attempt to contact MSC, INC. for price quotations on particular securities except for a very limited list of corporate securities in which, because of the size of MSC, INC.'s holdings, MSC, INC. was the principal "maker of the market".

Thus, MSC, INC. narrowed its trading activities to those few corporate stock issues over which it was able to maintain activity because of its position in those stocks. But even with respect to those issues, its ability to make a profit was substantially curtailed. The gross profits earned by MSC, INC. after February 13, 1959 were primarily from investment holdings of securities which remained in its portfolio for a substantial period of time. The number of MSC, INC. trading transactions in over-the-counter corporate securities was reduced to about 60% of its former volume and gross profits fell far below overhead. The sharp decline in MSC, INC.'s volume of trades in over-the-counter corporate securities after February 13, 1959 may readily be seen from the fact that in the seven months before February, 1959, MSC, INC.'s volume of trades in over-the-counter corporate securities was approximately \$6,850,000, whereas in the seven months subsequent to February, 1959, this figure had shrunk to approximately \$3,990,000. The foregoing is graphically demonstrated below:

(000)
1,200

1,100

1,000

900

800

700

600

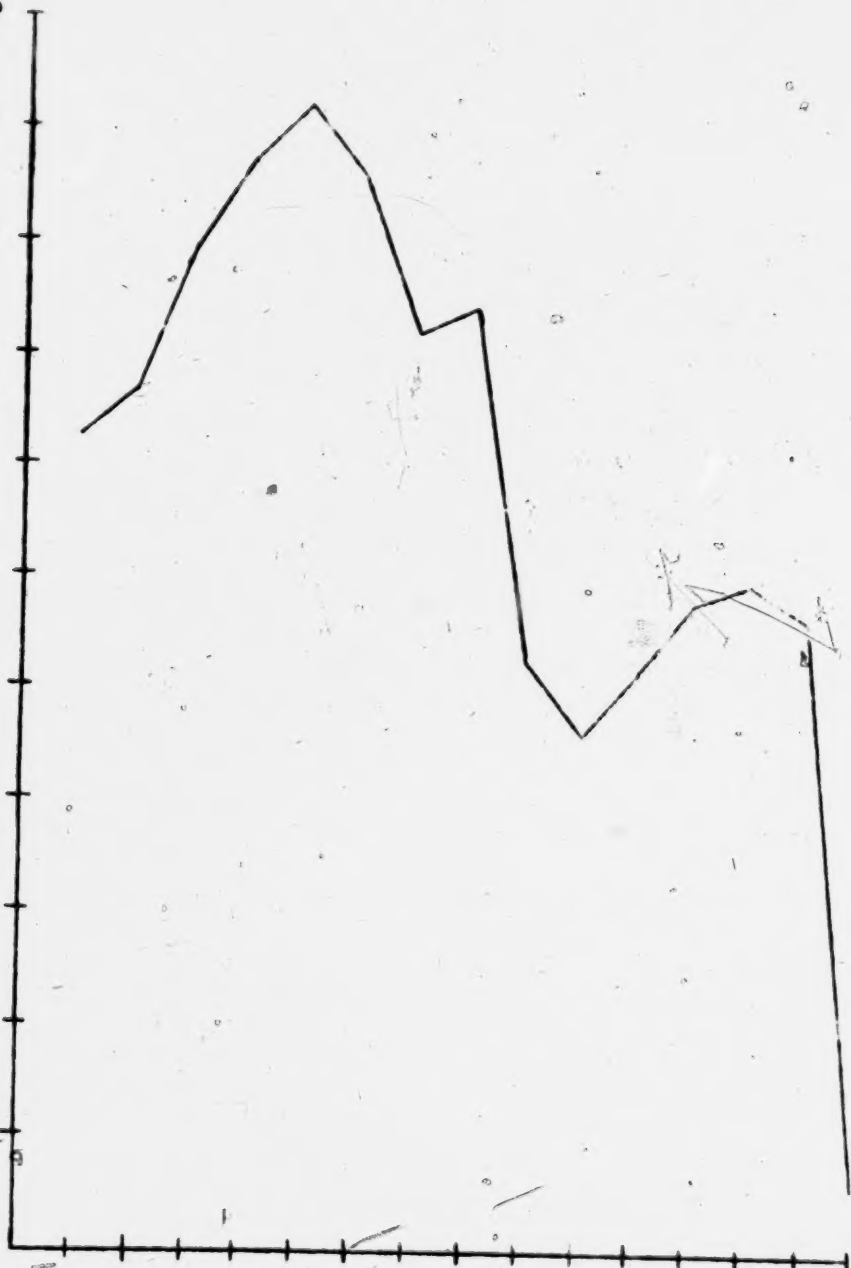
500

400

300

200

Jul (1958) Aug Sept Oct Nov Dec Jan Feb Mar Apr May Jun Jul Aug Sept (1959)



[fol. 40] After February 13, 1959 salesmen employed by MSC, INC. began to leave its employ. Some of them felt that they would be tainted because of their association with a firm not approved by the NYSE. Others, that they would be unable to generate sufficient business because of the difficulties under which the corporation was operating. Efforts were made to hire new salesmen to replace those who were leaving the firm and to expand its retail sales of securities. These efforts proved futile, since prospective employees either had heard of MSC, INC.'s difficulties with the NYSE or refused to accept employment after being informed about them. Between March 1, 1959 and September 30, 1959, the corporation suffered a loss of \$55,284.99 (exclusive of a long-term gain of \$19,970.00 on sales of securities held for investment).

By September 15, 1959 all of MSC, INC.'s branch offices were closed. Mr. Reed resigned his position as of that date and the few remaining MSC, INC. employees were laid off as of September 30, 1959. By October 1, 1959, MSC, INC. ceased functioning as an operating business organization. All that remained was its corporate existence, gross unliquidated assets (other than cash) amounting to \$63,406.22, and a net loss of \$17,007.93.

The Effect and Consequences of Disapproval on MSC.

While MSC, the proprietorship, remains in existence, it too has been substantially damaged by the NYSE's action of February 12, 1959. Although municipal bond quotations are rarely subject to rapid price movements, there are occasions when news of the offer or withdrawal of tax-exempt securities has a substantial and immediate effect upon municipal bond prices and rapid communication facilities are then essential to trading activities. More important than this, however, is the business lost because NYSE firms having municipal bond departments, precluded from having [fol. 41] private wire connections because of the NYSE's disapproval action, found it more convenient to call other municipal bond dealers with whom they did have private wire connections whenever they sought to purchase or sell municipal bonds.

For example, in 1958, the total dollar amount of MSC's transactions was \$54,607,729. In 1959, however, total dollar amount of MSC's transactions fell to \$31,762,532. MSC's gross profits on securities transactions in 1958 was \$306,603.19. For the same period in 1959, gross profits had dropped to \$143,933.58. The adverse effects of the NYSE's action on MSC can be demonstrated in still another way. On February 13, 1959 MSC employed seventeen persons. By January 1, 1960 the number of MSC's employees had shrunk to seven.

The Reasons for the NYSE's Action.

The litigation was instituted April 6, 1959. Following the commencement of the action defendant served a notice to take my deposition and the deposition of my wife, Evelyn B. Silver, as secretary-treasurer of the corporate plaintiff. A motion was made to modify the notice of examination. In response to that motion defendant submitted the affidavit of Frank J. Coyle, vice president in charge of its Department of Member Firms. This affidavit, duly sworn to May 18, 1959, states that:

"Information was received that during 1954, Mr. and Mrs. Silver, individually, and the Intercontinental Manufacturing Company, Inc. were the subjects of consideration under the industrial personnel security program of the Department of Defense, that Intercontinental had been engaged in the manufacture of aircraft parts and motors principally for the U. S. Government, that Intercontinental had lost its security clearance in April, 1954, that all Government contracts [fol. 42] were at that time withdrawn from Intercontinental, that Intercontinental was unable to establish business to replace that lost on Government contracts, and that Intercontinental was sold to U. S. Hoffman Corporation in 1955. That information, together with other information received by the Exchange during the course of the investigation, led the Exchange to believe that the temporary approval for the wire connections between the member firms and Municipal and the continuous ticker service should be discontinued."

The information that Mr. Coyle alleges was received by the NYSE is correct with respect to the denials of security clearance. However, I am informed by my attorneys that on June 29, 1959, the Supreme Court of the United States, in *Greene v. McElroy*, 360 U. S. 474, held that the Secretary of Defense and his subordinates had not been authorized to deny a defense contractor's employee access to his work, and thereby deprive him of his job on security grounds, in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination, and that as a result, the Defense Department's action, which apparently formed the basis of the NYSE's action here, was null and void.

The Need for Preliminary Injunctive Relief.

I have taken every step available to me in an effort to induce the NYSE to reverse its determination and to permit me to continue to engage in the corporate securities business personally or in a corporate form through plaintiff MSC, INC. I have vigorously sought to obtain the reasons for the NYSE's action in order to refute the information received by the Exchange and upon which it presumably based its action.

[fol. 43] In May, 1959 I attempted to finalize a correspondent advisory relationship with the firm of Delafield & Delafield, members of the New York Stock Exchange with offices in the City of New York, which had been under negotiation for some time. Under this relationship we would have been able to substantially increase our business and earnings. However, our negotiations were broken off due to the Exchange's action of February 12, 1959 and the fact that we were in litigation with the Exchange. Annexed hereto as Exhibit 55 is a letter from Delafield & Delafield dated May 21, 1959 terminating our discussions.

At about the same time Mr. Reed attempted to negotiate an arrangement with Eastern Securities Company of New York. Eastern Securities is a very large dealer in over-the-counter securities and is not a member of the New York Stock Exchange. However, it was reported to

me that Eastern Securities did not establish a direct wire connection with us because they had direct private wires to approximately sixty NYSE member-firms in the City of New York and did not wish to do anything to jeopardize their relationship either with those firms or the Exchange. At this time I do not know whether the decision of Eastern Securities Company was dictated by the Exchange or was the result of an individual decision on its part not to do business with me predicated upon my difficulties with the NYSE.

During this same period negotiations were held to acquire Midland Securities Co. of Orlando, Florida. Midland Securities is primarily a dealer in over-the-counter securities and has direct wire connections which it uses for the transaction of an over-the-counter business. My negotiations were conducted with a Mr. H. W. Bumpas as representative of Midland Securities. The negotiations seemed to be going satisfactorily and it appeared as if arrangements would be concluded. However, at that stage, Midland Securities announced that they could not enter [fol. 44] into any arrangement with us until our problems with the New York Stock Exchange had been resolved.

From February 13, 1959 the business of MSC, INC. and MSC steadily deteriorated. Efforts to stem this tide were unsuccessful in the case of MSC, INC. and by October, 1959 it ceased to exist as a functioning organization. Now, the only functioning organization is MSC, and it, too, will cease to exist unless the injunctive relief herein requested is granted by this Court. As previously pointed out, the NYSE's action not only reduced MSC's gross profits more than fifty per cent during 1959, but it caused a reduction in the total number of MSC's employees from seventeen on February 13, 1959 to seven by January 1, 1960. But this steady attrition of MSC's business and of its organization could be halted or deterred if NYSE member-firms are permitted to take independent action to restore or establish wire connections with MSC. Indeed, Exhibits numbered 17-25(c), 27-38, and 43-46 make it clear that NYSE firms would have continued to maintain their private wire connections with both MSC and MSC, INC., were it not for

the coercive effect that the NYSE's Constitution and Rules had upon their right of independent action. In fact, Walter Coleman, the assistant director of the NYSE's Department of Member Firms, during the course of the taking of his deposition in this proceeding, stated that no member firm had ever failed (during the seven to eight-year period of his recollection) to discontinue a private wire connection with a non-member firm after having been instructed by the NYSE to do so.

Conclusion.

I have exhausted every conceivable method of self-help in an effort to remain in the securities business. At every turn, my efforts have been frustrated by the February, 1959 action of the NYSE, and unless the NYSE's member firms are permitted to exercise their own independent [fol. 45] judgment to restore or refuse to restore their private wire connections, MSC will soon cease to exist as a functioning business. Because of the NYSE's Constitution and Rules, NYSE member firms are now unable to exercise their own independent judgment in this respect, and unless this Court takes immediate action to remove the continuing coercive effect of such Constitution and Rules upon them, the continuing irreparable injury caused MSC will soon result in a total and permanent destruction no money judgment can cure.

Harold J. Silver

Sworn to before me this 19th day of April, 1960. Eloise Masingill, Notary Public in and for Dallas County, Texas.

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF HARRY F. REED

State of Texas,
County of Dallas, ss.:

Harry F. Reed, being duly sworn, deposes and says:

I was formerly employed as General Manager and trader by plaintiff Municipal Securities Company, Inc. and submit this affidavit in support of plaintiffs' several motions herein.

My first employment was with Remick, Hodges & Co. in 1926. I remained with that firm until 1938, serving in a [fol. 46] number of different capacities. My last position with that firm was assistant at the trading desk. From 1938 to 1940 I worked for Van Tuyl & Abbe as an assistant trader; from 1940 to 1943 as manager of the trading department of Hardy & Hardy; from 1944 to 1951 as assistant to the head of the unlisted trading department of Carl M. Loeb, Rhoades & Co.; from 1951 to 1955 as a trader at Dallas, Rupe & Co.; from 1955 to 1956 as a principal of Reed & Sloan and from 1956 to 1957 as a trader for Perkins & Co. From late 1957 through the spring of 1958 I was engaged in readying a new stock issue for public distribution. From June, 1958 until September, 1959 I was employed as Manager of the trading department of Municipal Securities Company, Inc., a corporation organized June 12, 1958.

One of my first duties with MSC, INC. was to establish a communications system. On June 13, 1958, acting in compliance with the NYSE Rules, I prepared for Mr. Silver's signature an application for wire connections with member firms and an accompanying information form. On June 23, 1958, I also prepared and submitted to the NYSE an "Agreement for Continuous Quotations of the New York Stock Exchange" (stock ticker service). On June 25, 1958 the Exchange issued its temporary approval for stock ticker service. On or about that date, it also gave approval for our private wire connections with member firms.

Stock ticker service commenced on July 8, 1958 and our private wire connections were installed during June and

July. The stock ticker service was of some value in keeping abreast of movements and trends in security prices generally. It was also desirable to have stock ticker service as a customer accommodation, for although we made no commission from customer orders on listed securities, we believed that the ticker service would attract customers and we would derive profits from their over-the-counter transactions. And by the end of July, MSC, INC. was established with complete trading facilities.

[fol. 47] The importance of private wire connections in the over-the-counter securities market can best be illustrated by comparing the wire system to the floor of a national exchange. The market, i.e., the bid and asked price on a listed security, is established through floor traders at an exchange. Similarly, the market in an unlisted security is established by traders, who although they do not have face to face contact, are almost simultaneously in communication with one another through private wire facilities. An individual can purchase and sell securities with no more guide than the evening newspaper. But to engage in securities trading as a business, one's facilities and information must be as good as his competitor's. When profit or loss is measured in eighths of a point, delays in communication can be fatal.

The private wire system established by MSC, INC. was typical for medium size firms in the over-the-counter securities business. We had direct wires to the Dallas offices of Rauscher, Pierce & Co.; Dallas, Rupe & Son; Schneider, Bernet & Hickman; Eppler, Guerin & Turner; Merrill Lynch, Pierce, Fenner & Smith; Sanders & Co.; Dallas Union Securities Co.; Goodbody & Co.; Harris Upham & Co.; and E. F. Hutton & Co., all of whom were or became member firms of the NYSE. Through these links we were also able to obtain quotations from firms with whom they had private wire facilities. Schneider, Bernet & Hickman had a direct private line to G. A. Saxton Co.; Dallas Union Securities had a direct private line to Troster, Singer & Co.; and Dallas, Rupe & Son maintained a direct line to Singer, Bean & Mackie. These three firms, located in the City of New York, are large over-the-counter trading houses. Their trading markets were made quickly avail-

able to us by our direct line to their Dallas correspondents. And most pertinent, these three firms dealt in every over-the-counter security handled by MSC, INC.

In October, 1958, we established a direct Western Union Telemeter connection with the New York City office of [fol. 48] Straus, Blosser & McDowell, a member firm of the NYSE. This wire was used primarily to create markets in New York and Dallas on certain over-the-counter securities traded by our respective firms. Straus, Blosser & McDowell paid for the entire cost of this wire, and we orally undertook to guarantee them a minimum of \$1,000 a month in commissions on listed securities business. Parenthetically, MSC, INC. made no profit on listed securities transactions executed for our customers. This business was handled by us strictly as a customer accommodation, and all commissions went to the member firm through which we placed the order.

In addition to private wire connections with NYSE member firms, MSC, INC. had direct wire connections with the Dallas office of Shumate & Co.; First Southwest Co.; Parker, Ford & Co.; and Midland Securities Co. We did a moderate amount of business with the first three. Midland Securities Co. was not engaged in trading and maintained a wire to us principally for quotation service. Our direct wire network as of February 1, 1959 is graphically set forth in Exhibit 56, annexed hereto. Thus equipped, we were in a position to do a substantial business. Our largest activity, and from which we derived most of our income, was in trading for own account. We specialized in a selected list of over-the-counter securities, most of which were issued by corporations doing business in Texas.

In the first six months of operations, July-December, 1958, we had a total trading volume of approximately \$6,000,000 in over-the-counter securities and about \$2,500,000 in listed securities. Some income was derived from retail transactions with customers, but this accounted for a relatively small portion of the total although we were in the process of building a sales organization to increase this phase of our business. By January 1, 1959, we had two commissioned salesmen on our payroll and operated a branch office in San Antonio jointly with MSC. On January

1, 1959, we had seven fulltime employees and were anticipating further expansion.

[fol. 49] On February 13, 1959, shortly after the commencement of trading that day, I received a long distance telephone call from Mr. Bert Seligman of Straus, Blosser & McDowell. Mr. Seligman read me a letter he had just received from the NYSE advising that the Exchange had withdrawn its prior temporary approval for our private telemeter wire. I expressed my dismay and said that I did not know of any reason which could have prompted this action. Mr. Seligman said he would make inquiries on our behalf, but under the circumstances and until the matter was cleared up, we could have no further communications over the telemeter wire. I immediately told Mr. Silver of my conversation with Mr. Seligman. Sometime later in the day, Mr. Seligman telephoned me to report that he had spoken to a Mr. Coleman at the NYSE's Department of Member Firms, but Mr. Coleman would give him no reason for the NYSE's action. During the course of the day we also spoke to Fred Opitz of Cady, Roberts & Co. in New York City and John Rauscher, Jr. of Rauscher, Pierce & Co. in Dallas, both of whom undertook to make inquiries. However, they later reported that they could not obtain the reasons for the Exchange's action—they had been denied any information beyond the bare contents of the letter of disapproval.

During the following week we received telephone calls from all the NYSE member firms with whom we had established private wire connections. They all stated that they had received letters directing them to discontinue their wire connections with us and that all further communications over these wires would be stopped.

At first, we did not know whether the NYSE's order of discontinuance applied to the wires between MSC (the proprietorship) and the municipal bond departments at Merrill Lynch, Pierce, Fenner & Smith; Rauscher, Pierce & Co.; and Dallas Union Securities Co. MSC had never filed an application for these connections, and I am informed that these firms had never sought NYSE approval for such wires [fol. 50] or notified the NYSE of their existence. MSC's wires were used for municipal bond quotations and transac-

tions and were not used by MSC, INC. for corporate securities transactions. MSC, INC. had its own direct wires to each of these firms. I discussed this question with both Mr. Silver and D. Edward Walton, Manager of MSC and a Vice President of MSC, INC. I later learned that the Exchange considered its disapproval order to apply to MSC's wires also. Despite the fact that these member firms had not initially sought NYSE approval for establishing private wire connections with MSC, they nevertheless discontinued these connections when the NYSE directed them to do so.

On February 16, 1959, MSC, INC. received a letter from the NYSE advising that the stock ticker service would be discontinued. Two days later representatives of the Western Union Telegraph Company removed the equipment.

During the following months we tried to devise methods of operation which might permit us to remain in business without direct wires to NYSE member firms. The NYSE's action deprived us of most of our communications network. This may be seen from Exhibit 56. Instead of obtaining quotations in a matter of seconds over direct wires, we were relegated to conventional telephones. We would dial the number of the member firm from whom we wanted a quotation, reach the switchboard operator at its office, ask to be connected with its trading department, sometimes have to wait because the trading department extensions were busy, and finally reach a trader. We searched for ways to speed up this process and installed an automatic dialing system. This eliminated the time lapse in manual dialing, but the total time saved was nominal.

Traders at member firms who wished to contact us for our quotations also were required to use the regular telephone. Of course, they could rapidly communicate with one another, or with non-member firms with whom they had [fol. 51] direct wire connections. As a result, we received fewer and fewer inquiries. Generally speaking, the only inquiries we received related to specific stock issues in which our activities were so large that we were the principal "makers of the market."

Our competitors had a very substantial advantage in trading with us, because we lacked quick access to quotations and information. We were soon compelled to curtail our trading activities in the over-the-counter market to a very limited number of issues. However, even in those issues in which we played a substantial role in creating the market, our profits were diminished because we lacked efficient communications.

In order to be close to a source of quotations, I began to spend the better part of each trading day in the customer rooms of NYSE member firms. I sat in the board rooms and viewed the projected ticker tape in an attempt to keep abreast of current market developments. However, because I was not in my own office, I was unable to communicate with other trading houses, and was unavailable to customers who might be seeking MSC, INC.'s quotations.

The number of consummated transactions in over-the-counter securities (i.e., actual purchases or sales), with member firms with whom we previously had direct wire connections declined precipitously. This is graphically demonstrated by Exhibit 57. Transactions with Dallas Union Securities Co. are omitted, for it was a member firm only during a part of the period represented. The other firms are shown, both including and excluding Rauscher, Pierce & Co. A comparison of the number of principal transactions with each of these companies individually, both in over-the-counter and listed securities, is set forth in Exhibit 58.

Curiously enough, while the NYSE's disapproval action curtailed our transactions in over-the-counter securities, our transactions in listed securities showed a sharp increase. [fol. 52] Indeed, I was hopeful that the profits lost by the cut-back in over-the-counter activities could be made up by trading activities in listed stocks. The following chart sets forth a comparison of the dollar volume of MSC, INC. transactions as principal in over-the-counter and listed securities.

| Month | \$ Trading Volume (000 omitted) | |
|----------------|---------------------------------|--------|
| | Over-the-Counter | Listed |
| July '58 | 827 | 154 |
| Aug. | 866 | 207 |
| Sept. | 997 | 185 |
| Oct. | 1,077 | 452 |
| Nov. | 1,111 | 579 |
| Dec. | 1,060 | 870 |
| Jan. '59 | 920 | 659 |
| Feb. | 941 | 425 |
| March | 627 | 531 |
| April | 559 | 1,048 |
| May | 617 | 1,221 |
| June | 679 | 1,535 |
| July | 692 | 1,597 |
| Aug. | 661 | 650 |
| Sept. | 155 | 69 |

In the months of August and September, 1959 we were in the process of liquidating our holdings preparatory to going out of business. The comparative trading volume for the period of July, 1958 to July, 1959 is set forth graphically in Exhibit 59.

Our trading activities in listed securities failed to make up for our loss of profitable over-the-counter business. As shown below, our total dollar volume of principal transactions actually increased after February 13, 1959.

| Six Month Period from: | Volume | | (000 Omitted) |
|---------------------------|---------|---------|---------------|
| | OTC | Listed | Total |
| Aug. '58-Jan. '59 | \$6,031 | \$2,952 | \$ 8,983 |
| March '59-Aug. '59 | 3,835 | 6,582 | 10,417 |

[fol. 53] Despite this increase in dollar volume in the six month period of March, 1959 through August, 1959, we had a net loss of \$21,595. In the earlier six month period (August, 1958 through January, 1959) we had a net profit of \$17,622.

Placing our trading emphasis on listed rather than over-the-counter securities posed the following disadvantages: (1) when we traded over-the-counter securities we rarely paid commissions (transactions in listed securities were subject to broker's commissions); (2) over-the-coun-

ter securities are generally quoted on two bases, a dealer to dealer price (the inside market) and a price to the public (the outside market) (but there is no price differential on listed securities); (3) our trading activities in over-the-counter securities were firmly grounded on close personal study and constant attention to the affairs of the companies whose stock we traded (when we traded listed securities, the information we relied on was available to anyone).

The change from a profitable operation to a losing one was caused solely by our inability to maintain effectively our over-the-counter trading profits. It had nothing to do with market fluctuations. In the securities trading business it is a truism that profits can be made in a declining market to the same extent as in a rising one. In fact, the market continued to rise during all the time we were in business. The Standard & Poor's 500 Stock Indices for this period were as follows:

| Month | Index |
|----------------|-------|
| Aug. '58 | 51 |
| Sept. | 52 |
| Oct. | 54 |
| Nov. | 56 |
| Dec. | 58 |
| Jan. '59 | 59 |
| Feb. | 58 |
| Mar. | 60 |
| Apr. | 62 |
| [fol. 54] | |
| May | 63 |
| June | 64 |
| July | 65 |
| Aug. | 63 |

During the period in which we earned \$17,622 the market was rising. During the later period in which we lost \$21,595, the market was still rising.

In our efforts to develop profitable lines of business to compensate for the loss of trading profits, we attempted to expand our retail customer business in over-the-counter securities. By intensive effort we were able to develop a slight increase in the volume of such business (from \$1,213,000 in the six month period before February, 1959

to \$1,396,000 in the six month period after February, 1959). However, our attempts to bring about a substantial increase in this phase of our business were frustrated by our inability to hire salesmen. In the spring and summer of 1959 I tried to recruit three qualified salesmen. Two of these men knew about our problem with the NYSE and were not interested in coming to work for us until this problem was resolved. The third man was not aware of the NYSE's action, but when I told him the facts, he lost all interest in employment by our firm.

By the late summer of 1959, we all recognized that MSC, INC. could not survive the blow sustained by the loss of its private wire connections with NYSE member firms. Our dollar losses began to mount. In August, 1959, we sustained a net loss of over \$38,000. On or about September 15, 1959, I tendered my resignation and went off the payroll. I remained on the job until the end of September to assist in the liquidation of assets. On September 30, 1959 the last of MSC, INC.'s employees were laid off. Our net loss for September was \$13,720. A business which had grown to substantial proportions in the seven and a [fol. 55] half months prior to February 13, 1959 had just as rapidly declined in the seven and a half months following February 13, 1959.

Harry F. Reed

Sworn to before me this 20th day of April, 1960. Eloise Masingilli, Notary Public in and for Dallas County, Texas.

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 4

APPLICATION FOR PRIVATE WIRE CONNECTION.

June 13, 1958.

TO THE NEW YORK STOCK EXCHANGE:

We hereby apply for approval of the establishment and maintenance of a wire connection with a member firm (or member corporation) of the New York Stock Exchange, by means of which we may obtain continuous quotations of

the New York Stock Exchange, and we represent and agree with you that:

1. The name under which business of applicant is conducted is Municipal Securities Company, Inc.

The business of applicant is General Securities Dealer.

The place at which the private wire is to be installed is 600 First National Bank Building, Dallas 2, Texas.

The member firm (or member corporation) with which the private wire will be connected is: See list attached.

(Attach list, if more than one private wire connection is being applied for.)

[fol. 56]

2. Written notice will be given to the New York Stock Exchange (hereinafter called the Exchange) of any change of name, nature or place of business at which the private wire is in operation.
3. We are not engaged in, and will not engage in, the operation of any illegal business and we will not use, or permit anyone else to use, the quotations of the Exchange, or any of them, for any illegal purpose.
4. The continuous quotations of the Exchange received by us are for our individual use in our business at the places set forth above. We will not furnish said continuous quotations, nor will we permit said continuous quotations to be furnished by others, to any other person, firm or corporation, nor to any other office or place, except to a branch office of ours.

If the undersigned shall furnish, or permit to be furnished, said continuous quotations to any person, firm or corporation without the approval of the Exchange, we agree that the Exchange may sue the person, firm or corporation to whom said continuous quotations are thus furnished to prevent the receipt or use thereof by said person, firm or corporation without making us a defendant in such suit.

5. We will comply with any requirements of the Exchange respecting the location in our place or places of business

of our blackboards, tickers, telephones and instrumentalities, and will adopt and enforce, as respects persons entering our said place or places of business, any regulation which the Exchange may deem it advisable to insist upon in order to prevent said continuous quotations from being improperly taken from any of our offices or places of business.

At all reasonable times any person designated by you shall have access to our offices, and the right to observe [fol. 57] the use made of said quotations, and to examine and inspect all instruments and apparatus used in connection with the said service and that at all reasonable times any person designated by you shall have access to and the right to examine and inspect all our books, papers and records.

6. The said wire or other connections and the furnishing of said quotations to us shall be discontinued whenever you shall withdraw approval thereof.
7. You shall not be pecuniarily liable for the accuracy of any quotations furnished to us nor for any delays, errors or omissions in said quotations, nor for any damages occasioned thereby.
8. Sales prices and or bid and asked quotations of any stock, bond or other security at intervals of fifteen (15) minutes or less shall be deemed to be continuous quotations within the meaning of this agreement.
9. All reports to our customers on transactions in securities listed on the New York Stock Exchange shall clearly show whether we are acting as agent or principal and reports on transactions in such securities in which we act as agent shall show:
 - (a) The security bought or sold;
 - (b) The name of the securities market on which the transaction was made;
 - (c) The actual price paid for it, or received for it, on such market;

- (d) An offer to furnish, upon the written request of the customer, the name of the firm or corporation through whom the deal was executed;
- (e) The commission charged by said firm or corporation to us;

[fol. 58]

- (f) The commission, if any, charged to the customer by us.

MUNICIPAL SECURITIES COMPANY, INC.

.....
(Name of Applicant)

.....
(Authorized signature)

HAROLD J. SILVER, PRESIDENT

.....
(Name and title of individual signing)

ANSWER TO QUESTION 1, PART 4

| | |
|---|--------|
| Rauscher, Pierce & Co. | Dallas |
| Dallas, Rupe & Son | " |
| Eppler, Guerin & Turner | " |
| Merrill Lynch, Pierce, Fenner & Smith | " |
| Sanders & Co. | " |
| Harris Upham & Co. | " |
| Goodbody & Co. | " |
| E. F. Hutton & Co. | " |
| Schneider, Barnet & Hickman | " |

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 5

NEW YORK STOCK EXCHANGE
Department of Member Firms
11 Wall Street

INFORMATION TO BE FURNISHED BY NON-
MEMBER FOR PRIVATE WIRE CONNECTIONS
OR TICKER SERVICE

(Use separate sheets wherever necessary)

1. Name (full and exact title of firm or individual)
Municipal Securities Company, Inc.
2. Address 600 First National Bank Building, Dallas 2,
Texas
3. If incorporated, indicate where Texas
4. Description of business General Securities Dealer
[fol. 59]
5. List Exchange Memberships None
6. Indicate whether registered as follows:
 - (a) With S. E. C. as broker-dealer
Application filed
Yes No
 - (b) With S. E. C. as investment company
Yes No
 - (c) With S. E. C. as investment adviser
Yes No
 - (d) With Securities Department of any State
(indicate what states)
Application Filed—Texas
Yes No
7. Full name, title and home address of each of the principals, officers or partners, whether general or limited
Harold J. Silver, President, 6815 Hunters Glen Rd.,
Dallas, Texas

D. Edward Walton, Vice President, 3132 Hanover,
Dallas, Texas

Evelyn B. Silver, Secretary-Treasurer, 6815 Hunters
Glen Rd., Dallas, Texas

8. If a corporation, list below full name and address of each director

Harold J. Silver, President Address as above

D. Edward Walton, Vice President "

Evelyn B. Silver, Secretary-Treasurer "

9. Outline on separate sheet the business history of each of the individuals mentioned in 7 and 8.
10. Date of latest balance sheet or audit and approximate net working capital as shown thereon
June 13, 1958 \$25,000.00
11. Banking connections First National Bank in Dallas, Dallas, Texas
June 13, 1958

(Signature)

HAROLD J. SILVER, President

(Title)

[fol. 60]

BUSINESS HISTORY—10 YEAR

| From | To | Company | Position |
|-----------------------------|---------|--|------------------------------|
| RE: Harold J. Silver | | | |
| 3-48 | 5-55 | Intercontinental Mfg. Co., Inc. Garland, Texas | Pres. & Gen'l. Mgr. |
| 8-55 | 9-56 | Intercontinental Securities Company, Meadows Building, Dallas, Texas | Owner |
| 9-56 | Date | Municipal Securities Company (A prop.) 600 First National Bank Building, Dallas 2, Texas | Owner |
| RE: D. Edward Walton | | | |
| 1-46 | 1-50 | Fort Worth National Bank, Fort Worth, Texas | Ass't. Mgr. Bond Dept. |
| 1-50 | 11-50 | Wm. N. Edwards & Co. Fort Worth, Texas | West Tex. Rep. |
| 9-51 | 1-52 | Wm. N. Edwards & Co. | West Tex. Rep. |
| 1-52 | 9-55 | Fort Worth National Bank | Mgr. Bond Dept. |
| 9-55 | 3-56 | Russ & Company, Houston, Texas | Resident Mgr. |
| 3-56 | 9-56 | Moroney, Belsener & Co. Houston, Texas | V. P. & Mgr. Municipal Dept. |
| 9-56 | Present | Municipal Securities Company, Dallas, Texas | Manager |
| RE: Evelyn B. Silver | | | |
| 3-48 | 5-55 | Intercontinental Mfg. Co., Inc. Garland, Texas (Also Attorney—New York Bar) | Treas. & Ass't. Gen'l. Mgr. |
| 5-55 | to date | Attorney (New York Bar) 400 Madison Ave., N. Y., N. Y. | Self |

[fol. 61]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 6

E. F. HUTTON & COMPANY
Members New York Stock Exchange
Sixty One Broadway
New York 6, N. Y.
Whitehall 4-2100

June 2, 1958

New York Stock Exchange
Department of Member Firms
11 Wall Street
New York, N. Y.

Dear Sirs:

Attn: Mr. Platow

We would ask your permission to install a private telephone connection from our Dallas, Texas office to the offices of:

Shumate & Co.
524 First Nat'l Bk. Bldg.
Dallas, Texas

and

Municipal Securities Co.
600 First Nat'l Bk. Bldg.
Dallas, Texas

They are members of the National Association of Securities Dealers and have lines to other member firms.

Very truly yours,

AS/ms

[fol. 62]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 7

DALLAS RUPE & SON, INC.
Republic National Bank Building
Dallas 1, Texas

June 2, 1958

Mr. Arthur F. Platow
Division of Commissions and Quotations,
New York Stock Exchange
11 Wall Street
New York 5, New York

Re: *Private Wire Connection*
Municipal Securities Company, Inc.

Dear Mr. Platow:

We wish to have installed a private wire connection between our trading department and the office of Municipal Securities Company, First National Bank Building, this city.

Will you please send us a set of the forms for execution by Municipal Securities Company?

Very truly yours,

RBT:rp

[fol. 63]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 11

[Letters of similar import, plaintiffs' exhibits 6-10, 12, 13 and 16, were received by defendant from other member firms or corporations.]

SCHNEIDER, BERNET & HICKMAN, INC.
Members New York Stock Exchange
Investment Securities

1505 Elm
Dallas 1, Texas
Riverside 8-1201

June 24, 1958

MR. ARTHUR F. PLATOW
Department of Member Firms
New York Stock Exchange
11 Wall Street
New York 5, New York

Dear Mr. Platow:

We respectfully request your approval of a private wire connection between our firm and Municipal Securities Company, Inc., 600 First National Bank Building, Dallas, Texas.

Yours very truly,

s/ A. E. BERNET, JR.,
SCHNEIDER, BERNET & HICKMAN, INC.

AEBjr:lqs

[fol. 64]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 14

AGREEMENT FOR CONTINUOUS QUOTATIONS
OF THE NEW YORK STOCK EXCHANGE

June 23, 1958

TO THE NEW YORK STOCK EXCHANGE:

We hereby apply for a service of continuous quotations of the New York Stock Exchange and we represent and agree with you that:

1. The name under which business of applicant is conducted is Municipal Securities Company, Inc.
The business of applicant is General Securities Business.
The place at which service is to be furnished is 600 First National Bank Bldg., Dallas, Texas.
(If service at more than one place is desired, attach schedule on separate sheet)
The principal office of applicant (to which service will be billed) is same.
The type of service applied for is 1-Stock Service, Present Charge: \$95.00 a month. (Indicate whether stock or bond.)
2. Written notice will be given to the New York Stock Exchange (hereinafter called the Exchange) of any change of name, nature, or place of business at which continuous quotations are received by us from you.
3. We are not engaged in, and will not engage in, the operation of an illegal business and we will not use, or permit anyone else to use, the quotations of the Exchange, or any of them, for any illegal purpose.

[fol. 65] 4. The continuous quotations of the Exchange received by us are for our individual use in our business at the places set forth above. We will not furnish said

continuous quotations, nor will we permit said continuous quotations to be furnished by others, to any other person, firm or corporation, nor to any other office or place, except to a branch office of ours. But the foregoing shall not preclude a member firm or member corporation of the Exchange from furnishing said continuous quotations to a member or non-member with whom, with the approval of the Exchange, a private wire connection is maintained.

If the undersigned shall furnish, or permit to be furnished, said continuous quotations to any person, firm or corporation without the approval of the Exchange, we agree that the Exchange may sue the person, firm or corporation to whom said quotations are thus furnished to prevent the receipt or use thereof by said person, firm or corporation without making us a defendant in such suit.

We recognize that the privilege of furnishing quotations to our branch offices and to wire correspondents of members as outlined above does not include the right to furnish a complete service as to all quotations, and we agree that we will, at the request of the Exchange, limit the number and frequency of the quotations so furnished.

5. We will not attach or cause or permit to be attached to, or use or cause to be used in connection with, the wires, apparatus or equipment by which the said continuous quotations are received by us, any device or apparatus not approved by the Exchange.
6. We will comply with any requirements of the Exchange respecting the location in our place or places of business of our blackboards, tickers, telephones and instrumentalities, and will adopt and enforce, as respects [fol. 66] persons entering our said place or places of business, any regulation which the Exchange may deem it advisable to insist upon in order to prevent said continuous quotations from being improperly taken from any of our offices or places of business. At any and all times any person or persons designated by the Ex-

change shall have access to the office or place where said continuous quotations are received by us, and the right to observe the use made of said continuous quotations, and to examine and inspect all instruments and apparatus used in connection therewith in said office or place.

7. We will pay to the Exchange in advance the monthly charge from time to time fixed by the Exchange for said continuous quotations, plus any applicable federal, state or local taxes, and charges for additional equipment, installation, changes of location, removal, etc.
8. A strict compliance with the above provisions is and shall be a condition precedent to our right to continue to receive said continuous quotations and the Exchange may, with or without notice, forthwith discontinue said service whenever in its judgment there shall have been any breach of the foregoing agreements, or any of them.
9. The Exchange does not guarantee the sequence, accuracy or completeness of any of the quotations or market information of the Exchange. The Exchange shall not be liable in any way to us or to any other person, firm or corporation whatsoever for any delays, inaccuracies, errors in, or omissions of, any quotations and market information or the transmission thereof, or for any damages arising therefrom or occasioned thereby or by reason of non-performance or interruption of quotations for any cause whatever.
10. Sales prices and/or bid and asked quotations of any stock, bond or other security at intervals of fifteen (15) [fol. 64] minutes or less shall be deemed to be continuous quotations within the meaning of this agreement.
11. The furnishing of continuous quotations to us by you at any location shall continue in force until the expiration of thirty (30) days after written notice shall have been given by us to the Exchange or by the Exchange to us of an intention to terminate the same, unless

sooner terminated by the Exchange as provided in Clause 8 above.

12. This agreement shall continue in force and effect so long as continuous quotations of the Exchange are received by us at any office or place.

MUNICIPAL SECURITIES COMPANY, INC.
(name of applicant)

s/ HAROLD J. SILVER
(Authorized signature)

HAROLD J. SILVER
President

(Name and title of individual signing)

ACCEPTED:

New York Stock Exchange

By

Dated at New York, N. Y., 19....

PLEASE SIGN AND RETURN ORIGINAL AND DUPLICATE TO
NEW YORK STOCK EXCHANGE, 11 WALL ST., NEW YORK, N. Y.

[fol. 68]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 15

NEW YORK STOCK EXCHANGE
Ticker-Quotation Department
Eleven Wall Street
New York 5, N. Y.

June 25, 1958

Mr. Harry Reed
Municipal Securities Co., Inc.
600 First National Bank Building
Dallas, Texas

Dear Mr. Reed:

We are pleased to advise you that your application for continuous stock quotations service has been temporarily approved, pending further processing, and that we have issued our order to the Western Union Telegraph Company to install a stock ticker, associated with a Trans-Lux projector, in your office at the above address. We have requested Western Union to complete this installation as soon as possible which, under normal circumstances, will be in approximately two weeks.

Very truly yours,

[fol. 69]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 16

STRAUS, BLOSSER & MCDOWELL
Investment Securities
39 South LaSalle Street
Chicago 8, Ill.

ANdover 3-5700

111 Broadway
New York City
October 13, 1958

New York Stock Exchange
Department of Member Firms
11 Wall Street
New York City

Attention: Mr. Harold Shutz

Dear Mr. Shutz:

We hereby request permission to install a private wire over Western Union facilities to the Municipal Securities Company, Inc., 600 First National Bank Building, Dallas 2, Texas.

Very truly yours,

.....
B. J. Sinclair

[fol. 70]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 17

[Similar letters, plaintiffs' exhibits 18-25A and 37, were sent by defendant to other member firms or corporations.]

February 12, 1959

Messrs. Straus, Blosser & McDowell
111 Broadway
New York, New York

Attention: Mr. B. J. Sinclair

Gentlemen:

This is in reference to your application for a private wire connection with Municipal Securities Company, Inc., 600 First National Bank Building, Dallas, Texas.

Effective immediately, the Exchange has withdrawn the temporary approval granted your firm on October 15, 1958.

We would appreciate your advising us as soon as this wire has been discontinued.

Very truly yours,

ARTHUR F. PLATOW
Assistant Manager

[fol. 71]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 25A

February 12, 1959

Schneider, Bernet & Hickman, Inc.
1505 Elm Street
Dallas 1, Texas

Attention: Mr. A. E. Bernet, Jr.

Gentlemen:

This is in reference to your application for a private wire connection with Municipal Securities Company, Inc., 600 First National Bank Building, Dallas, Texas.

Effective immediately, the Exchange has withdrawn the temporary approval granted your firm on June 26, 1958.

We would appreciate your advising us as soon as this wire has been discontinued.

Very truly yours,

ARTHUR F. PLATOW
Assistant Manager

[fol. 72]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 25B

SCHNEIDER, BERNET & HICKMAN, INC.
Member, New York Stock Exchange
Investment Securities

February 16, 1959

New York Stock Exchange
Department of Member Firms
11 Wall Street
New York, N. Y.

Attention: Mr. Arthur F. Platow

Gentlemen:

A direct private wire to the Municipal Securities Company, Inc., 600 First National Bank Building, Dallas, Texas, is operating at the present time, as is a private wire to most of the other members of the N.A.S.D. in Dallas.

Please tell us what is necessary to get your approval for this connection.

Thank you very much.

Most sincerely,

W. L. JACK NELSON

[fol. 73]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 25C

February 18, 1959

Schneider, Bernet & Hickman, Inc.
1505 Elm Street
Dallas 1, Texas

Attention: Mr. W. L. Jack Nelson

Gentlemen:

Thank you for your letter of February 16, 1959, regarding the private wire connection to Municipal Securities Company, Inc., of Dallas, Texas.

Please refer to our letter of February 12, 1959, in which we advised that the temporary approval, previously granted your firm, has been withdrawn.

When the Exchange withdraws approval of a private wire, it effects all member firms of the New York Stock Exchange and does not have any bearing on non-member firms who may be members of the N.A.S.D.

We would appreciate your advising us as soon as this wire has been discontinued.

Very truly yours,

ARTHUR F. PLATOW
Assistant Manager

[fol. 74]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 26

MEMORANDUM.

Municipal Securities Co., Inc.

Harold J. Silver

February 16, 1959

Harold J. Silver, President of Municipal Securities Co., Inc., telephoned to Mr. E. C. Gray on 1/16/59, said he was in New York City, and wanted to talk to someone about our recent withdrawal of wire and ticker facilities. Mr. Gray referred him to me.

Mr. Silver came in and spent almost an hour talking to me. At the beginning of our conversation, I explained to him the long standing policy of the Exchange about not giving reasons for any disapproval or withdrawal of approval action.

He told me, in substance, that his reputation has always been of the best and that while he has made some business enemies as he has gone along, he feels that he has no more than the average person. He said he could think of no reason whatever, either personal, with respect to any of the officers or personnel, or with respect to the corporation itself, why the Exchange should feel it necessary to withdraw approval of a private wire and ticker.

He said that he had done some soul-searching and could not come up with any answer.

He asked whether, within the limits of our policies, I could be of any help to him.

I explained that he was at liberty to request reconsideration and I told him that if I were in his position, and if I determined to ask for reconsideration, I would support that request with qualitative letters of reference from friends, present and former business associates, present and former employees or employers, regulatory or supervisory authorities, etc., in respect of his entire organization, including officers and personnel.

[fol. 75] He asked whether legal assistance would avail him anything. I told him he was at liberty to employ legal assistance, of course, and that if he contemplated bringing legal action, such legal assistance might or might not prove to be of real help. I pointed out that, on the other hand, if he merely wishes the Exchange to review its action, there was very little in my opinion which legal assistance could offer to him.

He said that he does want to pursue the matter, but he has no desire to institute any legal action.

He asked whether it might expedite matters if he were to try a process of elimination in order to find out the reasons for the Exchange's recent action. For example, he suggested that he might disband his entire organization and just make application as an individual. If that were disapproved, he would know that he himself was an undesirable person as far as the Exchange was concerned, even though there might be other undesirables connected with his organization. If we approved tickers and wires, for him as an individual, he then would add officers or personnel one at a time, and "wait to see if anything happened" as far as the Exchange is concerned. He asked whether the Exchange would look with favor upon such a procedure, and I told him in my personal opinion the reaction would be unfavorable.

He said that the other alternative was to do a lot of leg work and paper work in the line of character references, and he felt that this was an almost futile task. However, he indicated that he would follow through along these lines.

He expressed great appreciation of my courtesy and "helpfulness."

I told him that if and when he does decide to ask for reconsideration he could do so either in person before staff of this Department or by letter. In either event, I suggested that he support such request with documentation.

WALTER COLEMAN.

[fol. 76]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 34

[Letters of similar import, plaintiffs' exhibits 27-33, 35, 36 and 38, were received by defendant from other member firms or corporations.]

RAUSCHER, PIERCE & Co., INC.
Mercantile Dallas Building
Dallas 1, Texas
Riverside 1-9033

February 17, 1959

New York Stock Exchange
11 Wall Street
New York 5, New York

Atten: Mr. Arthur F. Platow
Department of Member Firms

Gentlemen:

This is to advise that in compliance with your letter of February 12, 1959, we have ordered the private wire connection with Municipal Securities Co., Inc., 600 First National Bank Bldg., Dallas, Texas, discontinued effective immediately.

Very truly yours,

JOHN H. RAUSCHER, JR.,
Vice President.

[fol. 77]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 39

NEW YORK STOCK EXCHANGE
Eleven Wall Street
New York 5, N. Y.

February 13, 1959

Mr. Harry Reed
Municipal Securities Co.
600 First National Bank Bldg.
Dallas, Texas

Dear Mr. Reed:

As you know, temporary approval for the stock ticker installation in your office was given pending our customary investigation. Our processing of your application is now completed and, I wish to assure you, it was very carefully considered. We regret that we must tell you that your application has been disapproved and that the temporary approval previously given has been withdrawn.

Our order to The Western Union Telegraph Company to disconnect the ticker has been issued. The discontinuance of the service, and our billing therefor, will be effective after the close of business, February 18, 1959.

Very truly yours,

[fol. 78]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 40

February 26, 1959

Mr. G. Keith Funston
President
New York Stock Exchange
11 Wall Street
New York, New York

Mr. Edward C. Werle
Chairman, Board of Governors
New York Stock Exchange
11 Wall Street
New York, New York

Dear Sirs:

On February 13 temporary approval for a stock ticker installation in our office was withdrawn, and our direct telephone wires to various members of the New York Stock Exchange were discontinued, at the request of the New York Stock Exchange.

On February 13 I telephoned Mr. Platow, Assistant Manager, Department of Member Firms, who would give me no reason for the discontinuance of our facilities. On February 16 I visited Mr. Walter Coleman of the same department, and I was again unable to ascertain the reason for this discontinuance.

The private wires to our Municipal Bond Department had been installed since approximately September 1956. The private wires in the Corporate operation and the stock ticker had been installed since July 1958.

I feel that it is most imperative that I be advised of the reasons for the discontinuance of our wires and stock ticker [fol. 79] service in order that we may have the opportunity to set forth our position.

I appeal to your sense of justice and ask for the following: (1) Temporary reinstatement of the services, (2) that we be advised of the reasons for the action of the New York Stock Exchange, and (3) that we be given an opportunity to answer any charges and present whatever information you may require.

The action of the New York Stock Exchange against our firm involves twenty-six employees, and irreparable damage, financial and to their reputations, is being suffered by the firm and its employees. Temporary reinstatement of the services, pending a review of our matter, and prompt consideration and the granting of our request will serve to minimize damages.

Very truly yours,

HAROLD J. SILVER

[fol. 80]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 41

NEW YORK STOCK EXCHANGE
Eleven Wall Street
New York 5, N. Y.

March 4, 1959

Mr. Harold J. Silver
Municipal Securities Co.
600 1st National Bank Bldg.
Dallas 2, Texas

Dear Mr. Silver:

Thank you for writing to me about your problem.

While I can understand your position in wanting to know specific reasons for the recent action taken by the Exchange in connection with private wire and ticker service to your organization, I am sure you can also understand our position in declining to furnish such details.

Before taking any such action, the Exchange always makes a very careful and very thorough investigation.

I have personally reviewed the scope and results of such investigation in this case, and feel that the Exchange acted properly.

Sincerely,

/s/ G. KEITH FUNSTON

[fol. 81]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 42

NEW YORK STOCK EXCHANGE
Eleven Wall Street
New York 5, N. Y.

March 9, 1959

Mr. Harold J. Silver
Municipal Securities Co.
600 1st National Bank Bldg.
Dallas 2, Texas

Dear Mr. Silver:

I have just returned from an out of town trip—hence the delay in replying to your letter of February 26th.

As a matter of long standing policy, the Exchange does not furnish detailed reasons for its action in either approving or disapproving private wires or ticker service for non-members.

However, I have reviewed our files, and am in entire accord with the action taken by the Exchange.

Very truly yours,

s/ EDWARD C. WERLE

[fol. 82]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 43

SANDERS & COMPANY
Members New York Stock Exchange
Republic National Bank Bldg.
Dallas

March 9, 1959

New York Stock Exchange
11 Wall Street
New York 5, N. Y.

Gentlemen:

At the request of Mr. Harold J. Silver, we wish to advise you that we have had several trades with the Municipal Securities Company, both in over-the-counter stocks and stocks listed on the New York Stock Exchange, since about the middle part of July, 1958.

All of the transactions and business dealings that we have had with the firm of Municipal Securities Company and Municipal Securities Company, Inc. have been completely satisfactory.


Sincerely yours,

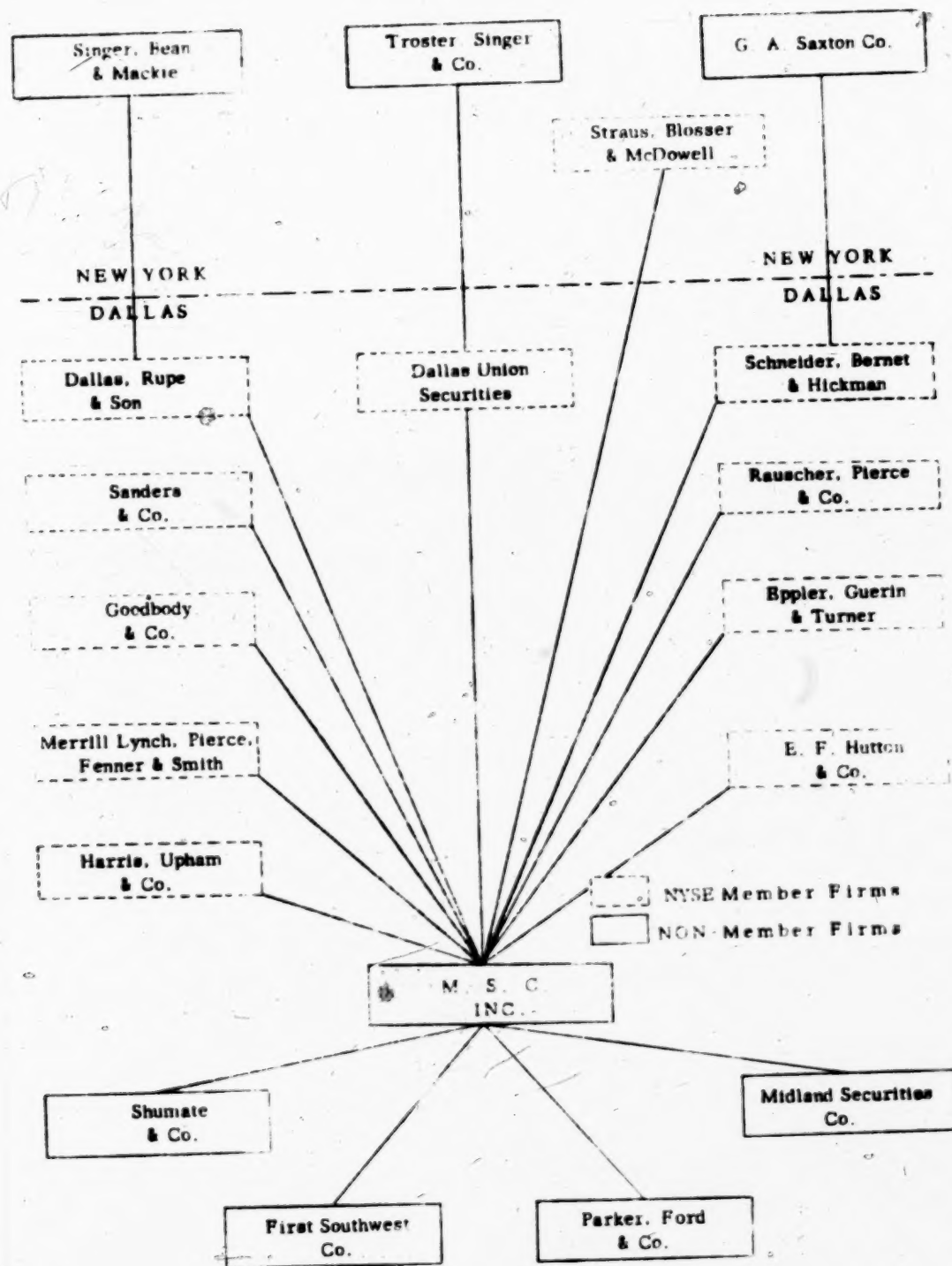
s/ Allen L. Oliver, Jr.
ALLEN L. OLIVER, JR.

ALO:lw

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 56

(See opposite) 




MSC, INC. PRIVATE WIRE NETWORK AS OF FEBRUARY 1, 1960

EXHIBIT No. 56

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 57

(See opposite) 

MSC, INC. Transactions as Principal in Over-the-Counter Securities

No. of
transactions

— All member firms

- - - All member firms (excluding Sawyer, Pierce & Co.)

110

102

90

80

70

60

50

40

30

20

10

July

Aug.

Sept.

Oct.

Nov.

Dec.

Jan.

Feb.

Mar.

Apr.

May

June

July

Aug.


Sept.

EXHIBIT NO. 52

[fol. 86]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 58

(See opposite) 

| | Goodbody & Co. | | Harris- Upham & Co. | | Sanders & Co. | | E.F. Hutton & Co. | | Schneider, Barnet & Hickman | | Dallas, Pope & Sons | | Eppler, Guerin & Turner | | Merrill Lynch, Pierce, Fenner & Smith | | Straus, Blosser & McDowell | | Rauscher, Pierce & Co. * | |
|-------|-------------------|--------|------------------------|--------|------------------|--------|----------------------|--------|-----------------------------------|--------|---------------------------|--------|-------------------------------|--------|---|--------|----------------------------------|--------|--------------------------------|--------|
| | OTC | Listed | OTC | Listed | OTC | Listed | OTC | Listed | OTC | Listed | OTC | Listed | OTC | Listed | OTC | Listed | OTC | Listed | OTC | Listed |
| 1958 | | | | | | | | | | | | | | | | | | | | |
| July | 3 | -- | 1 | 1 | 3 | -- | 6 | -- | -- | -- | 3 | -- | 7 | 2 | 10 | -- | -- | -- | 7 | 9 |
| Aug. | 4 | -- | -- | -- | -- | -- | 6 | -- | 1 | -- | 9 | 2 | 10 | 2 | 21 | -- | -- | -- | 3 | 7 |
| Sept. | 7 | -- | -- | 5 | 1 | -- | 2 | -- | -- | -- | 4 | 1 | 11 | -- | 16 | -- | -- | -- | 1 | 16 |
| Oct. | -- | -- | -- | 3 | 1 | 2 | 5 | -- | 5 | -- | 18 | -- | 3 | 2 | 10 | -- | 28 | 10 | 4 | 21 |
| Nov. | -- | -- | 2 | -- | 6 | -- | 5 | -- | 1 | -- | 2 | -- | -- | -- | 10 | -- | 38 | 15 | 4 | 31 |
| Dec. | 5 | 1 | -- | 1 | 6 | 2 | -- | -- | 1 | -- | 5 | -- | 2 | 3 | 11 | -- | 29 | 18 | 12 | 36 |
| 1959 | | | | | | | | | | | | | | | | | | | | |
| Jan. | 6 | -- | -- | 3 | 2 | -- | 4 | -- | 4 | -- | -- | -- | 8 | -- | 15 | -- | 7 | 19 | 37 | 45 |
| Feb. | -- | -- | 2 | 1 | 2 | -- | 2 | -- | -- | -- | -- | -- | 6 | 2 | 6 | -- | 9 | 1 | 26 | 39 |
| Mar. | -- | -- | 1 | -- | 7 | -- | 1 | -- | -- | -- | 11 | -- | 3 | 3 | 3 | -- | 1 | -- | 56 | 34 |
| Apr. | -- | -- | 1 | 1 | 4 | 3 | 1 | -- | -- | -- | 1 | -- | -- | -- | 7 | -- | -- | -- | 26 | 50 |
| May | -- | -- | -- | 1 | 2 | -- | 1 | -- | -- | -- | 2 | -- | -- | 1 | -- | -- | -- | -- | 15 | 40 |
| June | -- | -- | -- | -- | 3 | 1 | -- | -- | -- | -- | -- | -- | -- | 3 | -- | -- | -- | -- | 3 | 43 |
| July | -- | -- | -- | -- | 8 | -- | 10 | -- | 3 | -- | 4 | -- | -- | -- | 1 | -- | 1 | -- | 13 | 37 |
| Aug. | -- | -- | -- | -- | 5 | -- | 3 | -- | -- | -- | 5 | -- | -- | -- | 1 | -- | -- | -- | 13 | 25 |
| Sept. | -- | -- | -- | -- | 3 | -- | -- | -- | -- | -- | 1 | -- | 1 | -- | -- | -- | -- | -- | 7 | 11 |


Total transactions with Rauscher, Pierce & Co. for period of Nov., 1958 to April, 1959 was 161.

Of this total, 41 transactions were in Dallas Oil of Texas, a "permy" stock in which RSC, INC. was specializing.

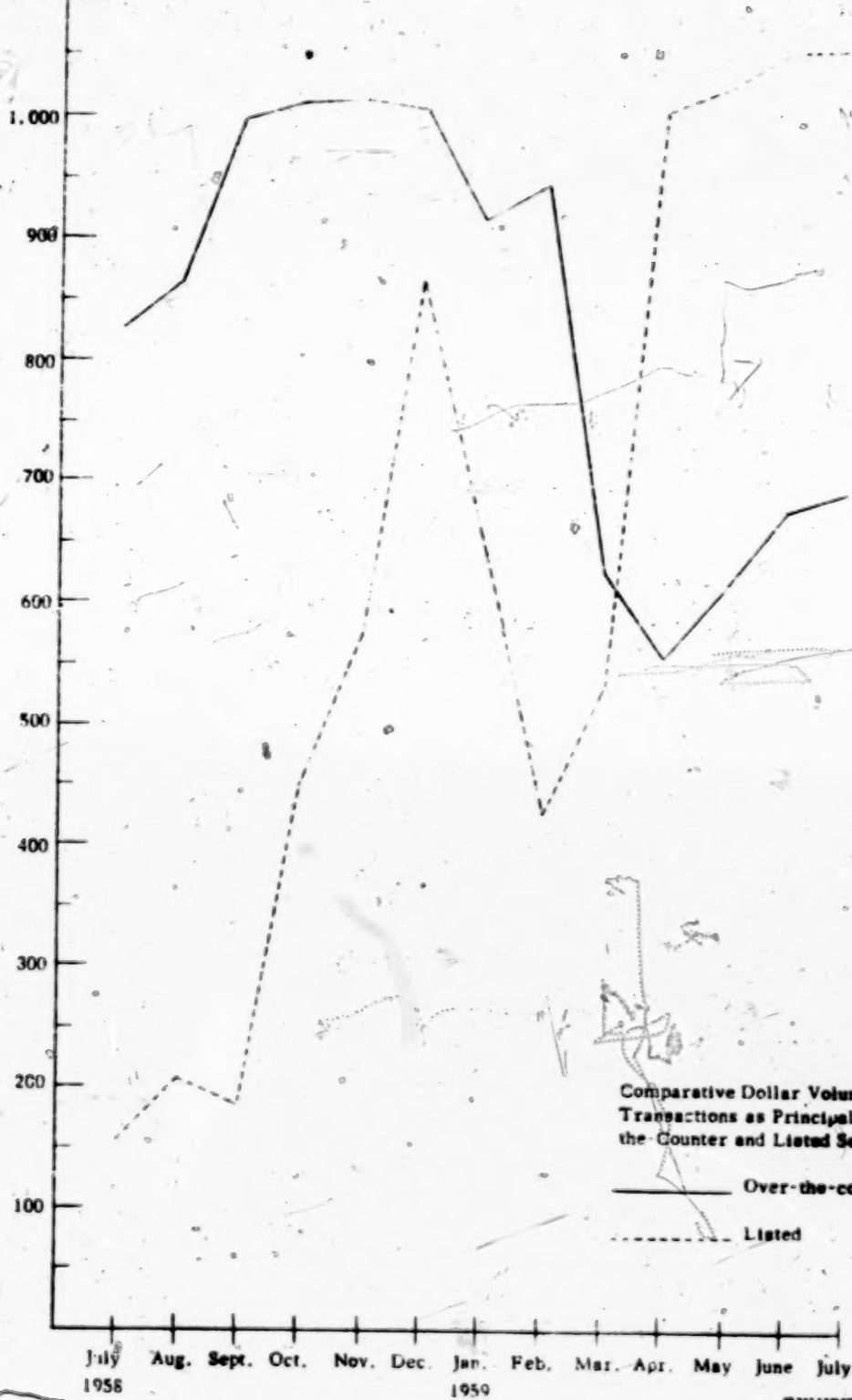
EXHIBIT NO. 53

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 59

(See opposite) 

Volume
(thousands)



Comparative Dollar Volume of
Transactions as Principal in Over-
the Counter and Listed Securities

Over-the-counter

Listed

84

[fol. 90]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 68

(See opposite) 

SHIELDS & COMPANY. SERVICE IN DEPTH

**WHAT'S BEHIND AN OVER-THE-COUNTER SALE?**

Behind every over-the-counter transaction is a trader whose job it is to find the best price to buy or sell an unlisted security. The Shields & Co. over-the-counter traders are connected by direct lines to major over-the-counter houses in New York, and to many principal cities across the nation. These men will investigate every source necessary to find a customer for your order at the best possible price. They bring vast practical experience to the problems of dealing in the thousands of secu-

rities that are traded only . . . over-the-counter.

Shields & Co. maintains primary markets in foods, mining, steels, transportation and electronics, which allows Shields traders instantly to translate customers' desires into action in these major areas.

Service in depth means service plus . . . at Shields & Company. The service you expect . . . and something more besides. It is as convenient to you as your nearest telephone. Just give us a call at Whitehall 3-5300.

SHIELDS & COMPANY

MEMBERS NEW YORK STOCK EXCHANGE


44 WALL STREET, NEW YORK 5, N.Y. • 606 FIFTH AVE., NEW YORK 10, N.Y.
60 CHURCH STREET, WHITE PLAINS, N.Y. • 150 DELAWARE AVENUE, BUFFALO, N.Y.

SERVICE IN DEPTH IS A SHIELDS TRADEMARK
ASK ANY CLIENT

l. 92]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 69

(See opposite) 

[fol. 93]

RECEIVED FROM THE OFFICE OF THE ATTORNEY GENERAL
RECEIVED FROM THE OFFICE OF THE ATTORNEY GENERAL

W18 5081

$\mathbb{P}^1 \times \mathbb{P}^1 \rightarrow \mathbb{P}^1$ $\mathbb{P}^1 \times \mathbb{P}^1 \rightarrow \mathbb{P}^1$
 $\mathbb{P}^1 \times \mathbb{P}^1 \rightarrow \mathbb{P}^1$ $\mathbb{P}^1 \times \mathbb{P}^1 \rightarrow \mathbb{P}^1$

● 2013 年 10 月 1 日起
● 2013 年 10 月 1 日起

DIALAPHONES

6 25 AUG 4

AUG 5

834

CHARGE FOR INSTALLING

20 00

U.S. TAX AT 10% OF ITEMS INDICATED BY *

08

20 91

TOTAL CARRIED TO BILL

THE FOLLOWING ARE THE MOST RECENT CHANGES TO THE END OF THE ROLLING

[fol. 94]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 70

TELETYPE CHARGES NECESSITATED BY THE DISCONTINUANCE OF THE
STRAUS, BLOSSER & McDOWELL WIRE TO MUNICIPAL SECURITIES
COMPANY, INC.

| Date | Stock | Sold To | Teletype Charges |
|---------|------------------------------|------------------------------------|---------------------|
| 2-13-59 | 100 Delhi Taylor | Dempsey, Tegeler Co., Houston | \$.95 |
| 2-16-59 | 300 Delhi Taylor | Dempsey, Tegeler Co., Houston | .75 |
| 2-18-59 | 200 Jefferson Lake Wts. | Jacques Coe & Co., New York City | 1.55 |
| 2-24-59 | 200 Electro Refractories | Doyle O'Connor & Co., Chicago | 1.90 |
| 2-24-59 | 128 Electro Refractories | Doyle O'Connor & Co., Chicago | 1.90 |
| 2-25-59 | 300 Baltimore Paint | L. H. Rothchild, New York City | 1.58 |
| 2-26-59 | 200 Baltimore Paint | L. H. Rothchild, New York City | 1.55 |
| 3-10-59 | \$3,300. Berlin 4 1/2/78 | C. Marks Co., New York City | 1.55 |
| 3-11-59 | 1,000 American Dryer | L. H. Rothchild, New York City | 1.55 |
| 3-12-59 | 200 Mid-West Instruments | L. H. Rothchild, New York City | 1.55 |
| 3-12-59 | 200 Amer. Indep. Re-Ins. | Grimm Co., New York City | 1.55 |
| 3-18-59 | 75 National Propane Pfd. | Dean Witter & Co., Chicago | 1.55 |
| 3-19-59 | 200 San Jacinto Pet. | Allen Co., New York City | 1.55 |
| 3-31-59 | 200 Mid-West Instruments | L. H. Rothchild, New York City | 1.55 |
| 4-1-59 | 200 Mid-West Instruments | L. H. Rothchild, New York City | 1.55 |
| 4-2-59 | 100 Mid-West Instruments | L. H. Rothchild, New York City | 1.55 |
| 4-2-59 | 200 Mid-West Instruments | L. H. Rothchild, New York City | 1.55 |
| 4-2-59 | 200 Mid-West Instruments | L. H. Rothchild, New York City | 1.55 |
| 4-3-59 | 100 Mid-West Instruments | L. H. Rothchild, New York City | 1.55 |
| 4-3-59 | 150 Mid West Instruments | L. H. Rothchild, New York City | 1.55 |
| 4-3-59 | 200 Mid West Instruments | L. H. Rothchild, New York City | 1.55 |
| 4-13-59 | 100 Mid-West Instruments | L. H. Rothchild, New York City | 2.00 |
| 4-17-59 | 200 Gulf Sulphur | Hardy & Hardy, New York City | 1.55 |
| 4-27-59 | 200 American Dryer | Hill Darlington Co., New York City | 1.55 |
| 4-28-59 | 100 Baltimore Paint | L. H. Rothchild, New York City | 1.55 |
| 4-29-59 | 100 American Dryer | Hill Darlington Co., New York City | 1.55 |
| 4-30-59 | 200 American Dryer | Hardy & Hardy, New York City | 1.55 |
| 4-30-59 | 300 American Dryer | L. H. Rothchild, New York City | 1.55 |
| 5-6-59 | 1,000 Ling Electronics, Pfd. | White Weld & Co., New York City | 1.55 |
| 5-11-59 | 10M Ling Electronics 5 3/4% | L. H. Rothchild, New York City | 1.55 |
| 5-15-59 | 1,000 Ling Electronics, Pfd. | L. H. Rothchild, New York City | 1.55 |
| 5-15-59 | 1,000 Ling Electronics, Pfd. | L. H. Rothchild, New York City | 1.55 |
| 5-15-59 | 50 Kirby Lumber Co. | David Morris & Co., New York City | 1.55 |
| 5-18-59 | 100 Mid-West Instruments | L. H. Rothchild, New York City | 1.55 |
| 5-18-59 | 200 Mid-West Instruments | L. H. Rothchild, New York City | 1.55 |
| 5-18-59 | 500 Ling Electronics, Pfd. | White Weld & Co., New York City | 1.55 |

[fol. 95]

| <u>Date</u> | <u>Stock</u> | <u>Sold To</u> | <u>Teletype Charges</u> |
|-------------|--|---------------------------------------|-----------------------------|
| 5-19-59 | 491 Ling Electronics Pfd | L. H. Rothchild, New York City | 1.55 |
| 5-21-59 | 400 Avien, Inc. | George O'Neill & Co., New York City | 1.55 |
| 6-2-59 | 1,000 Dixon Chemical Indust | Joseph Lann Securities, New York City | 1.55 |
| 6-3-59 | 200 Mid-Western Instruments | L. H. Rothchild, New York City | 1.55 |
| 6-5-59 | 1,000 American Dryer | Hardy & Hardy, New York City | 1.55 |
| 6-5-59 | 1,000 Dixon Chemical Indust. | Hardy & Hardy, New York City | 1.55 |
| 6-9-59 | 1,000 Dixon Chemical Indust. | Hardy & Co., New York City | 1.55 |
| 6-9-59 | 4,000 Dixon Chemical Indust. | Joseph Lann Securities, New York City | 1.55 |
| 6-9-59 | 4,000 Dixon Chemical Indust. | Joseph Lann Securities, New York City | 1.55 |
| 6-10-59 | 2,500 Dixon Chemical Indust. | Hardy Co., New York City | 1.55 |
| 6-11-59 | 200 Electronics Engineering of California | Hardy & Hardy, New York City | 1.55 |
| 6-12-59 | 200 Dixon Chemical Indust. | Hardy & Co., New York City | 1.55 |

| <u>Date</u> | <u>Stock</u> | <u>Bought From</u> | <u>Teletype Charges</u> |
|-------------|---------------------------------------|-------------------------------------|-----------------------------|
| 2-18-59 | 100 Baltimore Paint | L. H. Rothchild, New York City | 1.55 |
| 2-18-59 | 300 Baltimore Paint | L. H. Rothchild, New York City | 1.55 |
| 2-19-59 | 100 Pan American Sulphur | Hardy & Hardy, New York City | 1.55 |
| 2-19-59 | 300 Pan American Sulphur | Hardy & Hardy, New York City | 1.55 |
| 2-25-59 | 5,000 Dallas Oil | Hardy & Hardy, New York City | 1.55 |
| 2-26-59 | 5,000 Dallas Oil | Hardy & Hardy, New York City | 1.55 |
| 2-26-59 | 2,000 Dallas Oil | Hardy & Hardy, New York City | 1.55 |
| 2-26-59 | 2,000 Dallas Oil | Hardy & Hardy, New York City | 1.55 |
| 2-27-59 | 300 Jefferson Lake Pet. | Charles King Co., New York City | 1.55 |
| 3-2-59 | 225 San Jacinto Pet. | Smith, Barney, New York City | 1.55 |
| 3-4-59 | 200 Mid-West Instruments | Gold Weinman, New York City | 1.55 |
| 3-4-59 | 200 Mid-West Instruments | Gold Weinman, New York City | 1.55 |
| 3-4-59 | 200 Mid-West Instruments | Gold Weinman, New York City | 1.55 |
| 3-5-59 | 150 San Jacinto Pet. | White Weld, New York City | 1.55 |
| 3-5-59 | 200 Mid-West Instruments | Allen Co., New York City | 1.55 |
| 3-5-59 | 100 Mid-West Instruments | Allen Co., New York City | 1.55 |
| 3-9-59 | 600 Barcalo Mfg. | Straus, Blosser & McDowell, Chicago | 1.20 |
| 3-19-59 | 20 Pan American Sulphur | Dempsey, Tegeler, Houston | 1.15 |
| 3-25-59 | 200 Globe & Republic | John C. Legg Co., New York City | 2.45 |
| 3-25-59 | 2,000 Dallas Oil of Texas | Hardy & Hardy, New York City | 2.45 |
| 3-26-59 | 300 ARVIDA | Hardy & Hardy, New York City | 1.55 |
| 4-5-59 | 100 Public Service New Mexico Pfd. | A. P. Montgomery, New York City | 2.00 |
| 4-7-59 | 10 Public Service New Mexico Pfd. | A. P. Montgomery, New York City | 1.55 |
| 4-10-59 | 200 Baltimore Paint | L. H. Rothchild, New York, N. Y. | 1.55 |
| 4-14-59 | 10M Ling Electronics 534% | Wayne-Hammer, Chicago | 2.25 |
| 4-15-59 | Dallas Oil of Texas. 3,000 | Hardy & Hardy, New York City | 1.55 |

[fol. 96]

| Date | Stock | Bought From | Teletype Charges |
|-----------------------------|---------------------------------|--|------------------|
| 5- 6-59 | 400 Riverside Plastics | Hardy & Hardy, New York City | 1.55 |
| 5- 6-59 | 400 Riverside Plastics | Hardy & Hardy, New York City | 1.55 |
| 5-11-59 | Baltimore Paint, 500 | Hill Darlington, New York City | 1.55 |
| 5-11-59 | 2000 Textron 5's 1971 | Asiel Co., New York City | 2.00 |
| 5-11-59 | 2000 Textron 5's 1971 | Asiel Co., New York City | 2.00 |
| 5-12-59 | 100 Dixon Chem. Industries | Hardy & Co., New York City | 1.55 |
| 5-12-59 | 1,000 Riverside Plastics | George O'Neill Co., New York City ¹⁰⁰ | 1.55 |
| 5-15-59 | Avion | Wm. Frankel Co., New York City | 1.55 |
| 5-19-59 | 100 Dixon Chem. Industries | Hardy & Co., New York City | 1.55 |
| 5-19-59 | 300 Textron 5's 1971 | Asiel Co., New York City | 2.00 |
| 5-21-59 | 120 Meadow Brook Natl. Bank | New York Hanseatic, New York City | 1.55 |
| 5-21-59 | 125 National Terminal | Swift Henke, Chicago | 1.55 |
| 5-21-59 | 50 Texas Eastern Trans. Ptd | Eastman, Dillon, New York City | 1.55 |
| 5-21-59 | 100 Dixon Chem. Industries | Hardy & Co., New York City | 2.00 |
| 5-21-59 | 200 Dixon Chem. Industries | Hardy & Co., New York City | 2.00 |
| 5-22-59 | 200 Bates Mfg. | Eastern Securities, New York City | 1.55 |
| 5-26-59 | 100 Avion A | George O'Neill, New York City | 1.55 |
| 5-26-59 | 200 Dixon Chem. Industries | Hardy & Co., New York City | 1.55 |
| 5-27-59 | 200 Texas Eastern Trans. | Allen Co., New York City | 1.55 |
| 5-29-59 | 25 National Terminal | Swift, Henke, Chicago | 1.20 |
| 6- 1-59 | 50 Bates Mfg. | N. Y. Hanseatic Corp., New York City | 1.55 |
| 6- 1-59 | 10 Dixon Chem. Industries Units | Hardy & Co., New York City | 1.55 |
| 6- 2-59 | 100 Baltimore Paint | E. H. Rothchild, New York City | 1.55 |
| 6- 2-59 | 200 Dixon Chem. Industries | First Chelsea Corp., New York City | 2.00 |
| 6- 2-59 | 200 Dixon Chem. Industries | Joseph Lann Sec., New York City | 1.55 |
| 6- 4-59 | 300 Ling Electronics | N. Y. Hanseatic Corp., New York City | 2.00 |
| 6- 8-59 | 200 Dixon Chem. Industries | Birnbaum & Co., New York City | 1.55 |
| 6- 8-59 | 30 Dixon Chem. Industries | Birnbaum & Co., New York City | 1.55 |
| 6- 9-59 | 100 Amer. Ins. of Newark | F. I. DuPont, New York City | 1.55 |
| 6-10-59 | 150 Dixon Chem. Industries | Joseph Lann, New York City | 1.55 |
| 6-10-59 | 200 Dixon Chem. Industries | First Chelsea, New York City | 2.00 |
| 6-11-59 | 50 Ryder System | New York Hanseatic, New York City | 1.55 |
| 6-12-59 | 400 Dixon Chem. Industries | Hardy & Co., New York City | 1.55 |
| 5-12-59 | 100 Dixon Chem. Industries | First Chelsea, New York City | 1.55 |
| 6-15-59 | 200 American Dryer | Birnbaum Co., New York City | 1.55 |
| Total | | | \$184.18 |
| Plus 10% Federal Excise Tax | | | 18.42 |
| Grand Total | | | \$202.60 |

[fol. 97]

IN UNITED STATES DISTRICT COURT

PLAINTIFFS' EXHIBIT 71

MUNICIPAL SECURITIES COMPANY
(a Proprietorship)

STATEMENT OF INCOME

For the year ended December 31, 1958
with comparative figures for 1957

| | <u>1958</u> | <u>1957</u> |
|---|-------------------|-------------------|
| Operating income: | | |
| Gross profits on securities transactions, based on acquisition cost of inventory securities | \$205,991.77 | 91,676.18 |
| Adjustment, increase (decrease), to state inventory securities at lower of cost or market | (81,445.58) | 22,925.29 |
| | <u>124,546.19</u> | <u>114,601.47</u> |
| Operating expenses: | | |
| Proprietor's salary | 15,000.00 | 15,000.00 |
| Office salaries | 134,778.80 | 57,869.80 |
| Advertising | 5,062.45 | 2,428.51 |
| Automobile | 3,693.39 | 2,549.55 |
| Entertainment and promotion | 6,899.35 | 3,366.40 |
| Dues and subscriptions | 6,735.55 | 4,145.08 |
| License fees | 290.00 | 154.10 |
| Insurance | 2,667.51 | 1,838.94 |
| Office supplies | 4,253.99 | 4,012.70 |
| Stationery | 2,742.97 | 2,302.33 |
| Postage | 3,643.50 | 1,437.58 |
| Professional services .. | 10,402.16 | 9,168.86 |

[fol. 98]

| | 1958 | 1957 |
|---------------------------------------|----------------------|--------------------|
| Rent | 10,909.50 | 10,715.00 |
| Service charges | 4,970.19 | 3,397.82 |
| Taxes | 1,861.23 | 1,510.85 |
| Telephone and telegraph | 21,372.19 | 17,808.38 |
| Travel | 36,741.48 | 20,875.71 |
| Depreciation | 6,021.77 | 5,395.94 |
| Bidding expense | 102.15 | 275.87 |
| Books and periodicals | 693.06 | 625.29 |
| Charitable contributions | 234.00 | 150.00 |
| Commissions | 6,624.87 | 1,916.87 |
| Bond issuing expense | 15,080.78 | 121.94 |
| Miscellaneous | 2,476.63 | 121.66 |
| | <u>303,257.52</u> | <u>167,189.18</u> |
| | <u>(178,711.33)</u> | <u>(52,587.71)</u> |
| Other income: | | |
| Interest on municipal securities..... | 45,230.51 | 46,994.52 |
| Interest on notes receivable | 17,995.48 | 5,173.19 |
| Gain on sale of investment securities | 100,611.42 | — |
| | <u>163,837.41</u> | <u>52,167.71</u> |
| | <u>(14,873.92)</u> | <u>(420.00)</u> |
| Other charges—interest expense | 18,733.87 | 9,820.57 |
| Net loss for year | <u>\$(33,607.79)</u> | <u>(10,240.57)</u> |

See notes to accompanying balance sheet.

[fol. 99]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT IN OPPOSITION OF FRANK J. COYLE

State of New York,
County of New York, ss.:

Frank J. Coyle, being duly sworn says:

I am a vice president of defendant and in charge of its Department of Member Firms. I have read the affidavits of Harold J. Silver, sworn to April 19, 1960, and of Harry F. Reed, sworn to April 20, 1960, submitted in support of plaintiffs' motion for summary judgment on the first cause of action and plaintiff Municipal Securities Company's (herein "Municipal") motion for an injunction and make this affidavit in opposition to such motions.

The first cause of action alleges in substance that defendant conspired with certain of its member firms (1) to withdraw the temporary approval previously given for private wire connections between such member firms and Municipal Securities Company, Inc. (herein "Municipal, Inc."), (2) to discontinue private wire connections previously installed by Municipal with several of such member firms without defendant's approval and (3) to withdraw the continuous stock quotations (herein "stock ticker service") furnished by defendant to Municipal, Inc., pending defendant's investigations. The member firms of defendant are named as co-conspirators but not as defendants.

Defendant concedes that member firms having private wire connections with Municipal, Inc. were informed that defendant had withdrawn its temporary approval and that the member firms having unapproved private wire connections with Municipal were requested to discontinue them. [fol. 100] Defendant and not its member firms furnished the stock ticker service to Municipal, Inc. and the withdrawal of the stock ticker service was the unilateral act of defendant. The member firms did not participate therein.

"Virtually all" of Municipal's activities were concerned with transactions in municipal bonds (Silver aff., p. 1).

Municipal, Inc. was engaged in the over-the-counter securities market (Silver aff., p. 2). A few issues of municipal bonds and no over-the-counter securities are traded or listed for trading with defendant. Moreover, the transactions therein are not reported on the stock ticker service of defendant.

The principal place of business of Municipal and Municipal, Inc. was Dallas, Texas, a city for which the mid-year 1959 edition of "Security Dealers of North America" listed 56 broker dealers who were not members of defendant, 33 of whom had no private wire connections with member firms of defendant and 53 no stock ticker service of defendant. The same edition of "Security Dealers of North America" listed approximately 6,260 broker dealers. Approximately 5,600 of them were not member firms of defendant and approximately 3,100 had no private wire connections with member firms of defendant. Less than 450 of the latter had the stock ticker service of defendant, four of whom are in Dallas.

Defendant is an unincorporated membership association. It is duly registered as a national securities exchange with the Securities and Exchange Commission under the Securities and Exchange Act of 1934. It has its principal place of business at 11 Wall Street, New York City, and there provides a quality market for its members to execute orders for their own account and for the account of present and prospective investors in the securities listed for trading with defendant. Its constitution, by-laws, rules, regulations and the amendments thereto were filed with the Commission when, by order dated September 28, 1934, it registered defendant as a national securities exchange. Among defendant's standards and rules so filed were those applying to private wire connections of member firms with non-members and to the furnishing of ticker service by defendant to non-members.

Defendant adopted standards and rules for its members which it deemed advisable and necessary to protect the investing public and to maintain a quality market. They were developed over the years on an evolutionary basis. They are not set forth in detail only because it would be

impossible to detail them. They do embrace all of the factors having any bearing on the character, reputation and business ethics of the party making the application. Defendant's exercise of judgment is predicated on the basis of all of the information assembled and the possible effect thereof on defendant's repute and standing with the investing public. Defendant was required to and did file such standards and rules with the Commission, the body charged with the administration of the Act. They were subject to review and were not conclusive upon the Commission. The Commission, however, did not find them to be in anywise inconsistent with the Act, the rules and regulations thereunder or any other law. On the contrary, it did find that the standards and rules "are just and adequate to insure fair dealing and to protect investors." In its first annual report for the fiscal year ended June 30, 1935, the Securities and Exchange Commission said, among other things, with respect to the registration of exchanges as national securities exchanges:

"Pursuant to section 6 of the Securities Exchange Act of 1934, 24 exchanges submitted applications for registration as national securities exchanges.

"In considering these applications, the constitution, bylaws, and rules and regulations of each exchange were examined and analyzed. Each exchange was required to execute an agreement to comply with the provisions of the act and any rules and regulations [fol. 102] thereunder, and to enforce compliance with such provisions by its members, so far as is within its power. Each exchange was also required to include in its rules provision for the expulsion, suspension, or disciplining of members for conduct or proceeding inconsistent with just and equitable principles of trade, and to declare that willful violation of any provision of such act or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

* * * * *

"From time to time during the year, such registered exchanges filed amendments to their registration state-

ments. These amendments covered changes in membership, in exchange trading rules, securities admitted to listed or unlisted trading privileges, and in the rules for the government of exchanges. Such amendments were subjected to thorough analysis to ascertain whether the exchanges were being maintained in compliance with the provisions of the Securities Exchange Act of 1934, and the rules and regulations thereunder."

Defendant's members make no complaint with respect to the standards and rules. Complaint is made by non-members with respect to standards and rules having application only to defendant's members.

Municipal installed private wire connections in 1956 between its office and the municipal bond departments in the Dallas offices of two of defendant's member firms. About the same time, private wires were also installed by Municipal with a non-member of defendant and with the bond departments of three Dallas banks (Silver aff., p. 7).

Two years later, Municipal, Inc. made formal application to defendant for private wire connections with member [fol. 103] firms of defendant. The formal application was signed by Silver, as president of Municipal, Inc., and is dated June 13, 1958 (Moving papers, Ex. 4). It specifically provides in paragraph 6 thereof that: "The said wire or other connections and the furnishing of said quotations to us shall be discontinued whenever you shall withdraw approval thereof." Upon receipt of the "Information to be furnished by non-member for private wire connections or ticker service," signed by Silver, as president of Municipal, Inc., and dated June 13, 1958, (Moving papers, Ex. 5) defendant gave temporary approval. Although purporting to list the corporate connections of himself and the other officers of Municipal, Inc., for a ten-year period, Silver failed to do so. He admitted on the taking of his deposition that he had failed to list The Joggler Corporation and Trans-Mar, Inc. He did list Intercontinental Manufacturing Company, Inc., a corporation of which both Mr. and Mrs. Silver had been directors and officers, but he failed to disclose pertinent facts with respect thereto.

Municipal, Inc. also made application for defendant's stock ticker service. Under date of June 23, 1958, Municipal, Inc., by Silver, as president, signed an "Agreement for continuous quotations" (Moving papers, Ex. 14), and defendant gave its temporary approval pending further processing (Moving papers, Ex. 15). That agreement specified terms and conditions on which the stock ticker service was to be furnished. It specifically provided, among other things, that such service was for the "individual use" of Municipal, Inc. in its business, that Municipal, Inc. would strictly comply with its terms, that defendant, with or without notice, might forthwith discontinue the stock ticker service "whenever in its judgment there shall have been any breach of the foregoing agreements, or any of them" and, further, that even after fully approved, defendant might terminate on thirty days written notice.

As was its practice, defendant undertook an investigation of Municipal, Inc. and its officers through independent agencies [fol. 104] which defendant believed to be reliable and well qualified. The investigation disclosed, among other things, that the Defense Department has suspended the security clearance of Intercontinental and of the Silvers in 1953, and that their repeated efforts to have the suspension lifted had met with no success.

The investigation also disclosed much other information with respect to the Silvers. Among such other information was the fact that within two months of the time of the exchange of shares of Intercontinental for shares of U. S. Hoffman Machinery Corp. by the Silvers and after they had gone on record in writing that they had no present intention of doing so, they commenced selling their U. S. Hoffman stock.

Although plaintiffs would have this Court believe that the Silvers had not been informed of the specific charges which resulted in the suspension of their security clearance, the facts demonstrate the contrary. One of the documents produced on the taking of Silver's deposition disclosed they had been apprised that the charges were specified in sub-paragraphs of the Industrial Personnel and Facility Security clearance program, to wit, that they "intention-

ally and without authorization disclosed classified security information to Brady Aviation Corp., prior to clearance of that corporation," that they "willfully disregarded security regulations," that their "behavior, activities and associations tend to show that you are not reliable and trustworthy," that they "deliberately falsified facts and omitted to reveal certain material facts regarding the stock ownership of Intercontinental Manufacturing Company, Inc. to official representatives of the U. S. Navy and U. S. Air Force during the original and subsequent security clearance actions required," and that the "personal association with foreign nationals who hold a financial interest in Intercontinental Manufacturing Company, Inc. is of such nature as to lead the Board to believe that you might be subject to coercion, influence or pressure which might cause [fol. 105] you to act contrary to the best interests of national security."

Defendant ascertained that under date of January 7, 1954, the Screening Division of the Central Industrial Personnel Security Board, after consideration of all information available, had denied the Silvers security clearance for the reasons set forth in the Board's prior letter dated November 30, 1953, that the Silvers were advised they could appeal and the procedure available for review on appeal, that they requested and were granted a hearing on appeal that they appeared by counsel and in person and testified and were accorded a full hearing. Silver conceded that denial of their security clearance was affirmed and is still effective.

Defendant's investigation disclosed information which led it to conclude that the temporary approval for the private wire connections and for the stock ticker service should be withdrawn. It thereupon informed the member firms having the private wire connections with Municipal, Inc. of such withdrawal. Under date of February 13, 1959, defendant advised Municipal, Inc. that the stock ticker service would be withdrawn effective at the close of business on February 18, 1959.

Plaintiffs moved for discovery and inspection of all documents in defendant's files bearing on its investigation.

Certain of the documents contained information believed to be derogatory to the Silvers and defendant took the position that such information should be furnished only after direction by the Court. On February 25, 1960, after being shown the documents in question, Judge Bicks ruled that they need not be shown to plaintiffs unless plaintiffs first executed releases in favor of defendant, its investigating agencies and the persons who furnished the information. The following day plaintiffs applied to Judge Bicks for an order to preclude defendant from offering in evidence the documents or any of the information contained therein. Judge Bicks denied that application and adhered [fol. 106] to his prior determination. Later, on the taking of the deposition of Walter Coleman, an employee of defendant, plaintiffs sought without success to obtain by indirect means such documents and information. They then moved, among other things, to compel answers to specified questions which might have led to a disclosure of the information. In a memorandum opinion, Chief Judge Ryan limited plaintiffs' further inquiry in the light of the decision of Judge Bicks. In their moving affidavit on that motion, plaintiffs' counsel stated: "Plaintiffs recognize that they are bound by the terms of Judge Bicks' order, unless such order is subsequently set aside on appeal, and have elected not to execute releases in favor of individuals who have been the source of derogatory information which plaintiffs believe must be false." The documents in question will be handed to the Court at the time of the argument. They, as well as the other matters developed by the investigation, demonstrate that defendant did not act arbitrarily in withdrawing the temporary approval of the private wire connections with Municipal, Inc., and that defendant had good cause for withdrawing the stock ticker service.

At this point, it is important to analyze the exact nature of the claim. It is not charged that the withdrawal of the temporary approval of the private wire connections and of the stock ticker service prevented Municipal, Inc. or Municipal from conducting business on the same terms as prior to such withdrawal. Complaint is directed to the change in method of communication necessitated by the

withdrawal. Communication by private wire connections was found to be more convenient than other means of communication. Defendant's members continued to do business with both Municipal, Inc. and Municipal on the same terms as with all other customers. Municipal, Inc. concedes that "transactions in listed securities showed a sharp increase" after the withdrawal (Reed aff., p. 7). Silver testified that Municipal, Inc. and Municipal continued to do business with the same member firms of defendant after withdrawal [fol. 107] of the temporary approval of the private wire connections as prior thereto. None of defendant's members refused to do business with Municipal, Inc. or Municipal. None of them did business with Municipal, Inc. or Municipal on terms which differed from other customers, or, in other words, discriminatory terms. Withdrawal of such private wire connections and of the stock ticker service did not affect the number of broker dealers in securities. It did not affect the available supply of municipal bonds, over-the-counter securities or listed securities. It did not affect the number of purchasers or sellers of such municipal bonds, over-the-counter securities or listed securities. It did nothing more than to put Municipal, Inc. in the same position it was in before the temporary approval had been granted. The facts refute any refusal by any of defendant's members to deal with Municipal, Inc. and Municipal, that any of them dealt with Municipal, Inc. and Municipal on discriminatory terms or that any member of defendant gained or could gain any competitive advantage by defendant's withdrawal of the temporary approval of the private wire connections or of the stock ticker service.

As I previously stated, comparatively few issues of municipal bonds and no over-the-counter securities are traded or listed for trading with defendant and the trades therein are not reported on the stock ticker service. A large portion of the trading in over-the-counter securities is done by broker dealers who are non-members of defendant. Plaintiffs concede that in addition to the private wire connections with member firms of defendant, Municipal, Inc. had private wire connections with the trading desks of a number of broker dealers in Dallas who were not member

firms of defendant (Silver aff., p. 10, Reed aff., p. 4). Such private wires were unaffected by defendant's action. A study of the over-the-counter securities markets made by the Wharton School, University of Pennsylvania, and published in 1958, discloses that for the most part, broker [fol. 108] dealers purchase such securities for their own account and then later resell them. Municipal, Inc. concedes it derived most of its income by trading for its own account (Reed aff., p. 4) and that its change from a profitable operation to a losing one was caused solely by its inability to maintain effectively its over-the-counter trading profits (Reed aff., p. 9). It should be noted that listed securities represent the substantial volume of all business done by member firms of defendant. Municipal, Inc. is on record that it received no commission or fees "of any kind for this business" (Silver aff., p. 11). Banking institutions throughout the United States do a substantial portion of the municipal bond trading. Municipal admits it had private wire connections with three Dallas banks. The discontinuance of the private wire connections of member firms of defendant with Municipal did not affect Municipal's private wire connections with the Dallas banks.

The implication that defendant may have dictated Eastern Securities' decision not to establish a private wire connection with Municipal, Inc. (Silver aff., p. 22) is unwarranted and has no basis in fact.⁹ At all times, defendant has confined the enforcement of its standards and rules to its members.

Plaintiffs stress the alleged inconvenience in the use of a public telephone as contrasted with private wires in communicating with defendant's members. I again emphasize that defendant withdrew the temporary approval of the private wire connections only of its members with Municipal, Inc. The private wire connections of Municipal, Inc. with broker dealers in over-the-counter securities other than member firms of defendant belie the contention that Municipal, Inc. was unable to continue its business. Thirty-three other broker dealers in Dallas alone were able to conduct their business without such private wire connections. Furthermore, Municipal, Inc. continued to deal with

member firms of defendant after the private wire connections were discontinued on the same terms as prior thereto [fol. 109] and it is conceded that Municipal, Inc.'s trading in listed securities "showed a sharp increase" (Reed aff., p. 7).

Plaintiffs make no mention of the quotations appearing each morning in the National Quotation Bureau sheets which give the bid-ask quotations as of the preceding afternoon of each of the dealers making a market in specific over-the-counter securities, the Dow-Jones ticker service which furnishes periodic reports daily on stock and bond activity and current items of interest to the business world, or of the other means of communication available and used by them and numerous other broker dealers. The Bell System 1959 National Teletypewriter Directory lists Municipal as a subscriber with two Dallas numbers for its corporate and municipal departments. Dallas Rupe & Son is the only alleged conspirator not listed in that National Teletypewriter Directory. Finally, the volume of business of Municipal, Inc. in over-the-counter securities could not have increased by \$184,000 for the first six months period after withdrawal of the temporary approval of the private wire connections with defendant's member firms (Reed aff., p. 10) without some effective system of communication with other broker dealers in such securities. Municipal, Inc. ascribes its inability to bring about a more substantial increase in its business to the inability to hire salesmen (Reed aff., p. 10).

The attempt to picture Municipal as a successful and profitable enterprise (Silver aff., p. 20) is not borne out by its financial statements produced on the taking of Silver's deposition. Silver refers to Municipal's gross profits on security transactions for 1958 and 1959 in an endeavor to show that it was a profitable enterprise. The financial statements disclose that Municipal never operated at a profit and that the operating loss was in excess of \$52,000 for 1957, \$178,000 for 1958 and \$186,000 for 1959.

Plaintiffs refer to *Greene v. McElroy*, 360 U. S. 474, decided by the Supreme Court of the United States on June 29, 1959 (Silver aff., p. 21). We shall deal with the decision in

[fol. 110] our memorandum. Defendant's investigation did disclose the Defense Department had denied security clearance to the Silvers but defendant's action was predicated on the basis of all of the information disclosed by its investigations. We submit that the Defense Department, as one source of information, was a most reliable source.

It is not defendant's position that private wire connections with member firms and the stock ticker service were not desirable although unnecessary for plaintiffs' business. Approximately 3,100 broker dealers in securities carry on their business without such wire connections and a great many more without stock ticker service. It is defendant's position that private wire connections and stock ticker service are not matters of right for any broker dealer. They are available, however, for all broker dealers who meet defendant's standards and rules.

It is Municipal, Inc.'s position that the stock ticker service was of some value in keeping abreast of movements and trends in security prices generally, that the stock ticker service was desirable as a customer accommodation and would attract customers (Reed aff., p. 2), that the private wire connections with member firms of defendant put Municipal, Inc. in a position to do, but not that it did do, a substantial business by reason thereof. It is conceded that the largest activity of Municipal, Inc. and the one from which it derived most of its income "was in trading for our own account" (Reed aff., p. 4). We quote, "Curiously enough, while the NYSE's disapproval action curtailed our transactions in over-the-counter securities, our transactions in listed securities showed a sharp increase" (Reed aff., p. 7) and, further, that "The change from a profitable operation to a losing one, was caused solely by our inability to maintain effectively our over-the-counter trading profits" (Reed aff., p. 9). These statements bear contrast not only with the later statement that Municipal, Inc. increased the volume of its over-the-counter business from \$1,213,000 to \$1,396,000 in the first six months after withdrawal of temporary approval of the private wires and the stock ticker service (Reed aff., p. 10) but the more important facts that "Virtually all" of Municipal's activities were in mu-

municipal bonds and Municipal, Inc. was "actively engaged" in the over-the-counter securities market, trading in neither of which was reported on defendant's stock ticker service.

I repeat that the first cause of action charges defendant conspired with member firms in withdrawing the temporary approval of the private wire connections and the stock ticker service. Defendant did inform the member firms it had withdrawn the temporary approval of the private wire connections. It acted alone in withdrawing the stock ticker service; thus here, at least, plaintiffs must contend that defendant conspired with itself. Defendant and its members were not participants in any conspiracy. Defendant acted on the basis of information obtained from reliable sources and in strict compliance with its standards and rules and not otherwise.

It is respectfully submitted that there are genuine issues as to most of the material facts and Municipal has failed to make any showing as a matter of fact or of law which would entitle it to a preliminary injunction. The motions should be denied.

Frank J. Coyle

Sworn to before me this 23rd day of May, 1960.

John J. Jerome, Notary Public, State of New York,
No. 24-7085650, Qualified in Kings County, Certificate filed
in New York County, Commission expires March 30, 1962.

(Seal)

[fol. 112]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT IN OPPOSITION OF A. DONALD MACKINNON

State of New York,
County of New York, ss.:

A. DONALD MACKINNON, being duly sworn, says:

I am a member of the firm of Milbank, Tweed, Hope & Hadley, attorneys for defendant. I have read the affidavits of Harold J. Silver, sworn to April 19, 1960, and of Harry F. Reed, sworn to April 20, 1960, and make this affidavit to supplement the affidavit of Frank J. Coyle, sworn to May 23, 1960.

I took the deposition of plaintiff Harold J. Silver on February 29, March 1 and March 2, 1960. Among other things, Mr. Silver testified that the Defense Department had suspended the security clearance of both he and Mrs. Silver in 1953 (S. M. 24-25) and that such suspension was still effective (S. M. 56-57). He testified that he received notification of the suspension by a letter similar to the letter hereto annexed, made a part hereof and marked Exhibit A, addressed to Mrs. Silver and dated November 30, 1953. He testified that thereafter he received a letter from the Central Industrial Personnel Security Board dated January 7, 1954, copy of which is hereto annexed, made a part hereof and marked Exhibit B. He also testified that both he and Mrs. Silver availed themselves of their rights and appealed.

The hearing on the appeals was held before the Central Industrial Personnel Security Board, Appeals Division, on March 4 and 5, 1954. The transcript discloses that both Mr. and Mrs. Silver and their witnesses appeared in person [fol. 113] and testified and that they were represented by counsel of their own choosing. The transcript also discloses that the presiding officer informed the Silvers that they would be given an opportunity to refute the "Statement of Reasons" set forth in the letter of November 30, 1953, included in which were the charges that their behavior,

activities and associations tended to show they were "not reliable and trustworthy" and that they "deliberately falsified facts and failed to reveal material facts" with respect to the stock ownership of Intercontinental Manufacturing Company. In my opinion, Mrs. Silver's testimony with respect to what had been done to conceal the stock ownership of Intercontinental, without more, would have justified affirmance. Mrs. Silver was a lawyer of 20 years standing at the Bar. She admitted that what had been done "might have been wrong but, certainly, I didn't mean to do anything wrong by doing it that way."

The Silvers had been afforded full opportunity to testify on each of the "Statement of Reasons". The attorneys were permitted to add to their testimony and to state their own contentions without any limitation.

A. Donald MacKinnon

Sworn to before me this 23rd day of May, 1960.

Louis A. Wolf, Notary Public, State of New York, No. 30-9723500, Qualified in Nassau County, Certificate filed in New York County, Term Expires March 30, 1962.

[fol. 114]

EXHIBIT A TO AFFIDAVIT OF A. DONALD MACKINNON

CENTRAL INDUSTRIAL PERSONNEL SECURITY BOARD
165 North Canal Street
Chicago 6, Illinois

CJV/cl
30 November 1953

Mrs. Evelyn B. Silver
c/o Intercontinental Manufacturing Company
Garland, Texas.

Dear Mrs. Silver:

This is to notify you that a request for your proposed access to classified security information at Intercontinental Manufacturing Company has been submitted to the Central Industrial Personnel Security Board for review and decision.

Based on information available, the Screening Division of this Board has tentatively decided that consent for your employment on classified Army, Navy or Air Force contracts must be denied. The clearance issued by the Supervising Inspector of Naval Material on 17 March 1953 to you is hereby suspended for the following reasons:

Review of the information available to the Board indicates that the granting of clearance to Intercontinental Manufacturing Company is not clearly consistent with the interests of national security. The Screening Division of this Board finds that your case comes within the provisions of the following cited subparagraphs of the Industrial Personnel and Facility Security Clearance Program:

a. Paragraph 12a, Subparagraph (5), in that you intentionally and without authorization disclosed classified security information to the Brady Aviation Corporation prior to the clearance of that Corporation.

b. Paragraph 12a, Subparagraph (14), in that you have wilfully disregarded security regulations.

[fol. 115] c. Paragraph 12a, Subparagraph (15), in that your behavior, activities and associations tend to show that you are not reliable and trustworthy.

d. Paragraph 12a, Subparagraph (16), in that you deliberately falsified facts and omitted to reveal certain material facts regarding the stock ownership of the Intercontinental Manufacturing Company to official representatives of the U. S. Navy and U. S. Air Force during the original and subsequent security clearance actions required.

e. Paragraph 12a, Subparagraph (20), in that the personal association with foreign nationals who hold a financial interest in the Intercontinental Manufacturing Company is of such nature as to lead the Board to believe that you might be subject to coercion, influence, or pressure which might cause you to act contrary to the best interests of national security.

Nothing in the above statement of reasons shall be construed as limiting the scope of the inquiry which may be made by either Division or the basis for its decision, such inquiry and decision being limited only by the criteria stated in the Industrial Personnel and Facility Security Clearance Program.

Before the Screening Division of this Board makes a final determination, you may submit, in writing, any information to explain or refute the information set forth above. Such information may be in the form of letters, statements, or affidavits, and must be mailed to the Board within ten (10) days of the receipt of this letter by you.

In the event of your failure to submit such information, the Screening Division will make a decision based on the information available, without prejudice to your right of subsequent appeal to the Appeal Division of this Board in case of an adverse decision. You have no right to appear before the Screening Division of this Board either in person or be represented by counsel.

[fol. 116] You will be notified of the decision of the Screening Division. If the decision is adverse, you may appeal to

the Appeal Division before whom you may appeal in person and/or be represented by counsel. There is inclosed for your information a copy of the directive establishing this Board.

Sincerely yours,

C. J. VANDERHAEGHEN

C. J. VANDERHAEGHEN

Executive Secretary

Central Industrial Personnel Security Bd.

Incl-Basic directive

EXHIBIT B TO AFFIDAVIT OF A. DONALD MACKINNON

CENTRAL INDUSTRIAL PERSONNEL SECURITY BOARD

Chicago Air Procurement District

14th Floor—165 North Canal Street

Chicago 6, Illinois

7 January 1954

Mr. Harold J. Silver

c/o Intercontinental Mfg. Company, Inc.

Garland, Texas

Dear Mr. Silver:

Reference is made to the letter dated 30 November 1953 addressed to you by the Central Industrial Personnel Security Board in which it was stated that the Board had been requested to consider the granting of consent for your employment on or access to classified Army, Navy or Air Force contract work or information at Intercontinental Mfg. Company.

[fol. 117] On 7 January 1954 the Screening Division of this Board, after consideration of all information available, decided that access by you to classified security information and contract work of the Army, Navy or Air Force is not clearly consistent with the interests of national security and you are hereby notified that consent for your employment on

such work is denied for the reasons stated in the Board's letter referred to above.

You may appeal this decision. To make this appeal, you must file, within thirty (30) days of receipt of this letter, either personally or through an authorized representative, a written request for review of your case with the Chairman, Appeal Division, Central Industrial Personnel Security Board, c/o Chicago Air Procurement District, 14th Floor, 165 North Canal Street, Chicago 6, Illinois.

Two types of review are available: (1) review by the Board of the record, which may include affidavits, documents, or other data you may wish to submit as pertinent to your suitability for employment in connection with classified Defense Department contracts; (2) by filing written notice requesting an administrative hearing before the Appeal Division at which you may appear in person with or without counsel and witnesses of your selection. You are requested to indicate your preference in submitting your appeal.

Failure to file your appeal within thirty (30) days of receipt of this letter will compromise any claim you make for reimbursement if the decision of the Screening Division is reversed.

Sincerely yours,

C. J. VANDERHAEGHEN

C. J. VANDERHAEGHEN
Executive Secretary
Central Industrial Personnel
Security Bd.

FD/1

[fol. 118]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY AFFIDAVIT OF HAROLD J. SILVER

State of New York,
County of New York, ss.:

HAROLD J. SILVER, being duly sworn, deposes and says:

I submit this affidavit in reply to the affidavits of Frank J. Coyle and A. Donald MacKinnon and in support of plaintiffs' several motions.

THE REASONS FOR THE EXCHANGE'S ACTIONS.

The defendant now insists that it based its action upon (1) the fact that my wife and I had our security clearance suspended by the Department of Defense (Coyle Aff't, pp. 5-7); (2) the inference that I deliberately failed to advise the Exchange of prior business connections with The Joggler Corporation and Trans-Mar, Inc. and failed to disclose pertinent facts with respect to prior employment by Intercontinental Manufacturing Company, Inc. (Coyle Aff't, p. 5); (3) the claim that I improperly sold stock of the U. S. Hoffman Machinery Co., Inc. after agreeing not to do so (Coyle Aff't, pp. 5-6); and (4) certain unspecified information of an apparently scandalous nature (Coyle Aff't, pp. 7-8).

None of the foregoing is in any way pertinent to plaintiffs' motions which rest on a *per se* doctrine of antitrust law violation. However, because a failure to make reply might be construed as an implied admission of guilt, I believe that defendant's present version of the reasons for its action requires comment.

[fol. 119] It is true that both my wife and I were the subjects of consideration in a security proceeding conducted under the Industrial Personnel Security Regulations of the Department of Defense. It is also true that our clearances were suspended. Neither I nor the New York Stock Exchange can know why our security clearances were suspended. (See Exhibit No. 60, letter of September 5, 1958,

Office of Industrial Personnel Security Review to NYSE; Exhibit No. 61, letter of August 29, 1958 NYSE to Department of Army; Exhibit No. 62, letter of October 13, 1958, Department of Navy to NYSE.) There were a number of charges made against us. We believed we adequately answered all of them. Perhaps the security hearing board acted upon information which we had no opportunity to refute because it was not disclosed to us. This is precisely what the defendant did. I am advised that it was a lack of confrontation which led to the decision of the Supreme Court of the United States in *Greene v. McElroy*, 360 U. S. 474 (decided June 29, 1959). That decision declared the procedures of the Industrial Personnel Security Program to be invalidly authorized. I should add that although the answering affidavit of A. Donald MacKinnon makes extensive reference to the transcript of the hearing held before the Appeals Division of the Central Industrial Personnel Security Board, this transcript was not in the possession of defendant when it took the action of February 12, 1959. It was only seen by defendant's representatives when produced by me in discovery proceedings.

In spite of defendant's present attempt to show a myriad of reasons for its action, it is apparent from both the extrinsic facts and their prior statements that such action rested upon the denial of security clearance. My prior business connections with The Joggler Corporation and Trans-Mar, Inc. were so peripheral and inconsequential that my failure to set them forth in answer to the "business history" section of the information form provided by the New York Stock Exchange (Exhibit No. 5) was obviously [fol. 120] inadvertent. Certainly, the Exchange does not contend that it took the drastic action it did because of these omissions. If it were concerned about these omissions, it certainly could have asked me to furnish an explanation or give further information.

As to the claim that I improperly sold stock of the U. S. Hoffman Machinery Co., Inc. after agreeing not to do so, the fact is that the Securities and Exchange Commission was fully apprised of these transactions (Exhibit No. 63, letter of Goldberg, Fonville, Gump & Strauss to Regional Administrator, dated September 2, 1955; Exhibit No. 64,

letter of Regional Administrator to H. J. Silver, dated September 23, 1955; Exhibit No. 65, letter of H. J. Silver to Assistant Regional Administrator, dated April 12, 1957), and being so apprised did not report anything of a derogatory nature in answer to the standard inquiry of the NYSE (Exhibit No. 66, response of SEC to NYSE inquiry, dated July 21, 1958). Had the Exchange really harbored any doubt about the U. S. Hoffman stock transactions a specific inquiry to the SEC would have revealed all the facts. This the Exchange chose not to do. The reason for its omission is clear. It did not make such inquiry because its action was not based upon information concerning U. S. Hoffman stock transactions. So much was admitted by Walter Coleman, assistant director of the NYSE's Department of Member Firms. During his deposition of May 12, 1959, he was asked the following questions and gave the following answers:

"Q. Did any of the reasons for the Exchange's disapproval action have to do with securities transactions?

"A. Not directly. I think I explained to you in previous questioning—possibly I didn't—there were certain areas of information which were not in themselves a basis for the action, but which very possibly might have been considered had there not been, in our opinion, sufficient basis without them.

[fol. 121] "Q. Are you referring to the transactions in the stock of U. S. Hoffman Manufacturing Company?

"A. Yes." (*Id.*, at pp. 149-150.)

I cannot, of course, comment upon the unspecified derogatory information. Although I repeatedly asked the Exchange to apprise me of the reasons for its action and give me an opportunity to refute what can be nothing more than maliciously inspired gossip, the NYSE repeatedly refused to do so (see Exhibits No. 26, 40, 41 and 42). As the President of the NYSE replied: "While I can understand your position in wanting to know specific reasons for the recent action taken by the Exchange in connection with private wire and ticker service to your organization, I am sure you can also understand our position in declining to

furnish such details." The Chairman of the Exchange's Board of Governors said: "As a matter of long standing policy, the Exchange does not furnish detailed reasons for its action in either approving or disapproving private wires or ticker service for non-members."

The Exchange's reliance upon "faceless informers," with no charges, no confrontation, no opportunity for cross examination, and no opportunity to explain or refute in any form—is the essence of arbitrariness.

THE WITHDRAWN SERVICES.

Defendant emphasizes that quotations on unlisted securities and municipal bonds are not carried on the NYSE stock ticker service and that relatively few over-the-counter dealers have the stock ticker service. This is unquestionably true. The stock ticker service was employed by MSC, INC. primarily as an accommodation to those of MSC, INC.'s retail customers who desired quotations on listed securities at the same time that they sought quotations or made inquiries with respect to over-the-counter securities. The stock ticker service was not necessary for the doing of a business in over-the-counter securities. It was however desirable. Defendant agrees (Coyle Aff't. p. 12). Defendant also goes so far as to agree that private wire connections with NYSE member firms were desirable (but not necessary).

In support of its contention that such connections were not necessary for the doing of an over-the-counter business, the Exchange asserts that the 1959 edition of "Security Dealers of North America" lists fifty-six broker-dealers in the City of Dallas who are not member of the defendant, thirty-three of whom had no private wire connections with NYSE member firms (Coyle Aff't. p. 2). (Defendant apparently uses the term "broker dealer" as synonymous to "Member of the National Association of Securities Dealers." A numerical count of such firms in the Dallas section of the 1959 edition of "Security Dealers of North America" would so indicate.) However, the fact that a firm or individual registers as a broker-dealer with the SEC or becomes a member of the National Association of Securi-

ties Dealers does not mean that such firm or individual is engaged in the over-the-counter securities market or even that it is engaged in any securities business at all. Annexed hereto as Exhibit 67 are photostatic copies of the pertinent pages of the 1959 edition of "Security Dealers of North America."

In this connection, an examination of this directory (Exhibit No. 67) shows that at least sixteen of the thirty-three NASD members in Dallas not having private wire connections to NYSE member firms do not claim to be in either the over-the-counter, unlisted securities or general corporate securities business. They list themselves with such business descriptions as: "Dealers in Real Estate Securities & Mutual Fund Shares" (Armstrong Investment Company, p. 1239); "Dealers in Mutual Fund Shares & Bank & Insurance Stocks" (Cotter (W. R.) & Co., p. 1242); "Dealers in Mutual Fund Shares & Insurance Stocks" (Dorian & Company, p. 1246); "Insurance Companies Bought & Sold; Mergers & Negotiations Solicited for Acquisitions Through Outright Purchase or Stock Control" (Maxwell (M. B.) Associates, p. 1255); "Under-[fol. 123] writers & General Distributor of Southwestern Investors, Inc." (Southwestern Management and Research Corp., p. 1268); and "Dealers in Mutual Fund Shares" (Washington Underwriters, Inc., p. 1270). The other seventeen firms or individuals listed as members of the NASD, while listed as dealers in general or special stock or bonds, do not claim to have corporate securities trading departments. An examination of the 1959 alphabetical and classified telephone directories for the City of Dallas shows that Bulowski (Joe) Co. described as "Dealers in Stocks, Bonds & Mutual Funds" (p. 1240) has no telephone directory listing. The only listing is a residence for a Joe Bulowski at 5555 Wenonah. Rix Investment Company described as a dealer in "Stocks and Bonds" (p. 1263) has no telephone listing in either directory. Nor does its proprietor, Mary K. Rix. Similarly, A. Whitehead described as a "Dealer in Industrial Securities & Mutual Fund Shares" (p. 1271) is not listed in either directory.

The most important conclusion to be drawn from an examination of the Dallas section of the 1959 edition of

"Security Dealers of North America" is that every single "broker dealer" listed as having a trading department *also* has private wire connections with NYSE member firms (Carothers & Co., Inc., p. 1241; First Southwest Company, p. 1250; Garrett and Company, p. 1252; Hauser, Murdoch, Rippey & Co., p. 1254; Hudson (R.S.) & Co., Inc., p. 1254; Municipal Securities Company, p. 1258; Parker, Ford and Company, Inc., p. 1260; Shumate & Company, Inc., p. 1266; Underwood (R.A.) & Co., Inc., p. 1269; Walker, Austin & Waggener, p. 1270; Manney & Company, wires shown at p. 1254 under E. F. Hutton & Company and at p. 1263 under Dallas Rupe & Son, Inc.). Accordingly, defendant's contention that private wire connections to NYSE member firms are unnecessary to do an over-the-counter corporate securities *trading* business is absurd. The NYSE and its member firms know better. For example, see the advertisement of Shields & Co., an NYSE member firm, in "The [fol. 124] New York Times," May 24, 1960, p. 53, annexed hereto as Exhibit No. 68.

Defendant also contends that private wire connections with NYSE member firms were not necessary to the conduct of an over-the-counter trading business because there are other adequate and equivalent means of information and communication (Coyle Aff't, p. 11). It refers to the National Quotation Bureau sheets, the Dow-Jones ticker service and the Bell System National Teletypewriter Service. The National Quotation Bureau sheets are described by Professor Louis Loss as follows:

"The 'inside' quotations appear in the Daily Quotation Service published by the National Quotation Bureau, Inc., a private corporation. This service—divided into stock sheets and bond sheets—contains listings for upward of 5,000 issues of stock and perhaps half as many corporate bond issues in a typical day. The service is sold only to brokers or dealers duly qualified to do business by federal and state authorities and approved by the Bureau with a view to ensuring the integrity of the sheets. Each subscriber may insert a specified number of entries. For each security listed, the sheets show the names of the in-

interested dealers, the number of shares or bonds for which prices are quoted by each dealer, and usually each dealer's bid and offer.

"More than 2,000 dealers throughout the country subscribe and report their bids and offers. The sheets are issued in three editions—the Eastern from New York, the Western from Chicago and the Pacific Coast from San Francisco—and particular securities may be listed on a given day in one or all of the editions. The listings are gathered by two o'clock of the day on which the sheets are dated, and most subscribers have the sheets by the opening of business the next [fol. 125] day.* The quotations in the sheets are not transaction prices, or even firm bids or offers which can be accepted so as to create a contract. They merely indicate a willingness on the part of the dealers inserting them to trade with other brokers or dealers within the specified limits. But dealers are expected to have a genuine interest in each security they list, with respect to both price and quantity, and those who acquire the reputation of 'backing away' from their listings soon find that they might as well not list. The fact is that dealers can usually effect transactions at prices somewhere between the bid and offer shown in the sheets. In any event, the quotations are sufficiently reliable to be accepted by the courts and the SEC as a persuasive indication (not as conclusive evidence) of the prevailing market between dealers." *Loss, Securities Regulation*, 710-711 (1951).

Professor Loss adds by footnote:

"Sometimes dealers fail to insert specific bids and offers; the price column is left blank or the symbol 'OW' or 'BW' is used for 'offer wanted' or 'bid wanted.' One or the other of these practices is followed when a firm is attempting to develop an interest in a particular security whose market has been dor-

* The combined Eastern and Western edition was mailed from Chicago or New York. It was usually received in Dallas two days after publication.

mant, or has a general interest at other than current prices; 'OW' or 'BW' indicates a somewhat greater readiness to do business than leaving the space entirely blank and also indicates what side of the market the firm is on. Another reason for omitting figures is that member firms are prohibited by various exchanges from making off-board bids or offers at fixed prices for securities traded on their exchange. *E.g.*, [fol. 126] N. Y. Stock Exch. Rule 623. (The sheets include issues traded on exchanges, but *listed* issues, as distinct from those admitted to unlisted trading privileges, are usually included only when the exchange volume is small.) The National Quotation Bureau requires subscribers to insert a specific price for at least five out of every ten entries submitted." (*Id.*, at p. 710, fn. 5.)

The foregoing description makes it apparent that the information furnished by the National Quotation Bureau, Inc. was not a substitute for immediate current information as to the actual price at which various firms were willing to buy or sell unlisted securities. Such information could be gathered effectively only by obtaining comparative spot quotations from four or five different dealers over private wire connections. An actual purchase or sale might then be made at the best price. At best, the Daily Quotation Service was a guide to the approximate range in which trades might be made and an indication as to which firms were actively interested in a particular security. MSC, INC. initially subscribed to the Daily Quotation Service on June 16, 1958 and published ten to fifteen items a day therein. And, while that service was one of MSC, INC.'s available trading tools, it served an entirely different purpose than did the private wire connections.

The Dow-Jones ticker service, known in the trade as "the broad tape," is a business reporting service which defendant describes as furnishing "periodic reports daily on stock and bond activity and current items of interest to the business world" (Coyle Aff't, p. 11). While such information is useful in the sense that it keeps traders apprised of general information tending to affect security

prices, it does not furnish spot quotations which enable an over-the-counter trader to make specific trades.

The Bell System National Teletypewriter Service is one means of communicating between subscribers to the service [fol. 127] vice. It is actually a substitute for conventional long distance telephone communication and offers the advantage of lower toll charges than long distance telephone. It is nevertheless a costly means of obtaining quotations, whereas through private wire connections between MSC, INC. and NYSE member firms, quotations were obtained at no charge to MSC, INC. (see, *infra*, pp. 13-14). In 1959 the basic teletypewriter message charge between Dallas and New York was \$1.55, between Dallas and Chicago \$1.20, and between Dallas and Houston \$0.75 (subject to 10% Federal Excise Tax). In addition to being a costly method of obtaining quotations, it was an inefficient one and hardly a substitute for private wire connections. When MSC, INC. wanted to obtain the comparative quotations of five over-the-counter dealers in New York City prior to February 13, 1959, a teletype message would be sent over the private telemeter wire to Straus, Blosser & McDowell at no charge to MSC, INC. In a matter of seconds the trader at Straus, Blosser & McDowell would flip five keys, obtain five quotations and immediately teletype this information back to us. When MSC, INC. wanted to obtain the same information *after February 13, 1959*, it was required to communicate separately and individually by consecutive teletype wires to each of the five over-the-counter dealers. By the time the fifth quotation had been obtained, the first quotation might have been changed by the quoting house. Moreover, these five quotations would have cost MSC, INC. a minimum of \$8.53 (inclusive of Federal Excise Tax) without even resulting in an actual transaction. When trading profits are measured in eighths of a point, such a competitive disadvantage is difficult to overcome.

The Facts of Damage

Defendant has apparently misread plaintiffs' moving affidavits. At p. 10 of the affidavit of Harry F. Reed it was stated that "we attempted to expand our retail customer business in over-the-counter securities. By intensive effort [fol. 128] we were able to develop a slight increase in the

volume of such business (from \$1,213,000 in the six months before February, 1959 to \$1,396,000 in the six-month period after February, 1959)." Defendant has taken this to mean that after February 13, 1959 MSC, INC. was able to increase the volume of its trading activities in over-the-counter securities in spite of the unavailability of private wire connections with NYSE member firms. This increase, however, as Mr. Reed's affidavit makes clear, was only in *retail* transactions and does not reflect or refer to MSC, INC.'s corporate securities *trading or wholesale* activities. The fact is that the volume of our *retail* business in over-the-counter securities was generated by salesmen in direct contact with individual customers. As is customary in doing an over-the-counter business, we acted as principal rather than broker in entering into transactions with individual customers. The private wire connections with member firms were important to our retail over-the-counter business only to the extent that such connections permitted us to buy and sell, for and from our inventory, at the best possible price. The absence of private wire connections with member firms did not affect our gross retail volume; it affected only our profits from retail over-the-counter operations.

With respect to volume of *trading* activity in over-the-counter corporate securities, as I have already pointed out in my prior affidavit at pp. 17-18, our volume declined precipitously after February 13, 1959. In the seven months before February, 1959, MSC, INC.'s volume of trades in over-the-counter corporate securities was approximately \$6,850,000, whereas in the seven months subsequent to February, 1959, this figure had shrunk to approximately \$3,990,000.

Prior to February 13, 1959, MSC paid the Southwestern Bell Telephone Company \$6.00 per month for the private wire connection to the Bond Department of Dallas Union Securities and \$5.00 per month for the private wire connection [fol. 129] to the Bond Department of Rauscher, Pierce & Co., Inc. However, MSC, INC. paid nothing for its private wire connections to NYSE member firms in Dallas. After February 13, 1959, in an effort to diminish the amount of time required for obtaining quotations over

conventional telephone lines, MSC, INC. installed an automatic dialing system which eliminated the time lapse involved in manual dialing (Reed Aff't, p. 6). This electronic dialing device, called "Dialaphone," was installed on August 4, 1959 by the Southwestern Bell Telephone Company at an installation cost of \$20.00 and a monthly carrying charge of \$6.88, including Federal Excise Tax. Annexed hereto as Exhibit No. 69 is a photostatic copy of the bill of the Southwestern Bell Telephone Company for "Dialaphone" installation and service. This was an item of expense attributable solely to the withdrawal of private wire connections to NYSE member firms, and to no other possible cause.

In addition, prior to February 13, 1959 MSC, INC. enjoyed the use of a direct private wire connection to an NYSE member firm in New York at no charge to itself, i.e., the private telemeter wire paid for by Straus, Blosser & McDowell (see Reed Aff't, April 20, 1960, p. 3). After February 13, 1959 MSC, INC. expended \$7.10 in long distance telephone communications to Straus, Blosser & McDowell's New York office—communications which otherwise would have been transmitted over the Straus, Blosser & McDowell telemeter wire. Moreover, the discontinuance of the private telemeter wire between MSC, INC. and Straus, Blosser & McDowell's office in New York City ended the arrangement under which MSC, INC. at no toll cost to itself obtained quotations from or entered into transactions with firms with whom Straus, Blosser & McDowell had private wire connections. After February 13, 1959, when MSC, INC. wanted to make a transaction with such houses, it was required to use the Bell System National Teletype-writer Service and pay a per message charge for each communication. For the period February 13, 1959 through [fol. 130] June 15, 1959, the teletype message charges for communications with firms from whom MSC, INC. had previously communicated through its wire to Straus, Blosser & McDowell cost MSC, INC. a total of \$202.60, including Federal Excise Tax. Annexed hereto as Exhibit No. 70 is a list of the charges incurred during that period. On June 15, 1959, after having been unsuccessful in negotiating an arrangement with Eastern Securities Company (see H. J.

Silver Aff't, April 19, 1960, pp. 21-22), MSC, INC. completed arrangements for a private telemeter wire between its office in Dallas and Hardy & Hardy's office in New York. Hardy & Hardy, not a member of the NYSE, paid for the entire cost of this wire and thereafter MSC, INC. was better able to obtain quotations from and enter into transactions with other New York over-the-counter dealers.

MSC's Profits

With respect to MSC's profits from municipal bond operations, defendant states that in 1957 MSC sustained an operating loss of \$52,000, in 1958 an operating loss of \$178,000 and in 1959 an operating loss of \$186,000 (Coyle Aff't, p. 12). Obviously, defendant can take little comfort from MSC's operating loss in 1959 for virtually all of the year's business was conducted after defendant had taken its action of February 12, 1959. Moreover, an analytical examination of MSC's audited Statement of Income for the years 1957 and 1958 demonstrates that MSC earned money over the two-year period ending December 31, 1958. Annexed hereto as Exhibit No. 71 is the comparative statement of income for years ending December 31, 1957 and December 31, 1958 as prepared by Peat, Marwick, Mitchell & Co. The defendant has failed to take note of the substantial items of "Other income" reported for 1957 in the amount of \$52,167 and in 1958 in the amount of \$163,837. Both of these items were of course subject to reduction by "other charges—interest expense" in the amount of \$9,820 [fol. 131] and \$18,733. Moreover, the adjustment shown for inventory values was a bookkeeping entry not reflective of cash flow. Actual gain or loss could only be realized when bonds held in inventory were actually sold, and our strong capital position enabled us to hold bonds for a better market. Further in each of the years 1957 and 1958 I drew \$15,000 from the proprietorship which was denominated as "Proprietor's Salary." This item in a single proprietorship is of course an element of income.

However, the true impact of defendant's action upon MSC's business is measurable in terms of the decrease in the total dollar amount of MSC's transactions. Volume

decreased by 42% in 1959 from the volume achieved in 1958. (See H. J. Silver Aff't, April 19, 1960, p. 20, for dollar figures.)

The Relief Sought by MSC, INC.

It should be noted that plaintiff MSC, INC. does not seek preliminary injunctive relief, but only partial summary judgment on the issue of liability and summary judgment for permanent injunctive relief.

As I stated in my moving affidavit, MSC, INC. has ceased to function as an operating business organization. It has no employees and retains only its corporate existence, its Texas license as a securities dealer, its broker-dealer registration with the Securities and Exchange Commission, its membership in the National Association of Securities Dealers, and certain unliquidated assets. If MSC, INC. were to be granted a preliminary, rather than a permanent injunction, I would not and could not attempt to re-establish it as a functioning organization. First of all, employees would be unwilling to return to work on a temporary basis accorded by a preliminary decree. Secondly, as a practical matter, I could not undertake the substantial financial investment which is required to restore MSC, INC. as an operating organization under such a cumulative [fol. 132] stance. On the other hand, if MSC, INC. were to be awarded a permanent injunction, employees could be offered employment on a more permanent basis and the otherwise highly speculative financial investment necessary to place MSC, INC. on an active and profitable footing could be undertaken with much less risk of loss.

Harold J. Silver

Sworn to before me this 26th day of May, 1960.

Arthur J. Galligan, Notary Public, State of New York,
No. 31-1364450, Qualified in New York County, Commission Expires March 30, 1961.

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY AFFIDAVIT OF A. DONALD MacKINNON

State of New York,
County of New York, ss.:

A. Donald MacKinnon, being duly sworn, says:

I have read the affidavit of Harold J. Silver, sworn to May 26, 1960, and make this affidavit in reply.

Mr. Silver purports to have far more knowledge of the affairs of Municipal Securities Company (herein "Municipal") and Municipal Securities Company, Inc. (herein [fol. 133] "Municipal, Inc.") than at the time his deposition was taken. He then disavowed knowledge of many pertinent facts, testified that D. Edward Walton was primarily in charge of the affairs of Municipal, that Walton was also a vice president and a director of Municipal, Inc. and that management of the affairs of Municipal, Inc. was largely entrusted to Harry F. Reed. He testified that Walton was discharged by Municipal on October 19, 1959, and that Reed is now with another Dallas brokerage firm. Their testimony is needed in order to develop the full facts.

Mr. Silver concedes that Municipal, Inc. failed to list either the Joggler Corporation or Trans-Mar, Inc. in the "Information to be furnished by non-member for private wire connections or ticker service" (Moving Papers, Ex. 5). Plaintiffs' position is, in effect, that token compliance was sufficient and that defendant and not the applicant was required to see that the requested information was furnished.

Although Municipal, Inc. received only temporary approval for the private wire connections and the stock ticker service, plaintiffs contend, in effect, that the temporary approval was in fact final approval. They ignore Municipal, Inc.'s express agreement that the private wire connections and the stock ticker service could be discontinued whenever defendant withdrew approval (Moving Papers, Ex. 4, p. 2). They thus contend that defendant acted at its peril in granting temporary approval and that

defendant's conditional agreement with Municipal, Inc. was in fact an agreement without any conditions.

Mr. Silver concedes that both he and Mrs. Silver were denied security clearance by the Defense Department and that all of their efforts to have the suspension lifted have met with no success. Under the circumstances, defendant had the right to rely on the Defense Department's action. Among other things, the Silvers were charged with behavior, activities and associations tending to show that they were not reliable and trustworthy. Moreover, Mrs. Silver [fol. 134] admitted that the Silvers might have done wrong in concealing the stock ownership of Intercontinental Manufacturing Company. To use her own words, "It might have been wrong but, certainly, I did not mean to do any wrong by doing it that way."

We submit that defendant acted reasonably in withdrawing the temporary approval for the private wire connections and the stock ticker service for the following reasons:

1. Defendant had not approved Municipal's private wire connections;

2. Municipal, Inc. had agreed on receiving temporary approval that the private wire connections and the stock ticker service should be discontinued whenever defendant withdrew approval;

3. Municipal, Inc. was requested to furnish a list of Silver's corporate connections for a ten-year period and failed to do so;

4. The denial of security clearance by the Defense Department on charges, among others, that the Silvers' behavior, activities and associations showed that they were not reliable and trustworthy; and

5. The concession that the Silvers might have done wrong in concealing the stock ownership of Intercontinental Manufacturing Company and the attempt to excuse the wrong by saying "I did not mean to do any wrong by doing it that way."

The action of defendant, far from being arbitrary, was taken only after careful consideration of the results of an investigation conducted by experienced, independent agen-

cies. Subsequent reports confirmed the results of the initial investigation and left no doubt as to the truth of the charges made against the Silvers. Obviously, defendant could not possibly conduct a public hearing every time it withdraws temporary approval of the use of its facilities. This is [fol. 135] especially true in the case of a non-member who is not bound by the procedures applicable to members.

Defendant believes the facts before the Court, without more, demonstrate that its action in withdrawing the temporary approval of the private wire connections and the stock ticker service was reasonable. Defendant will not submit on this motion the additional information developed on the investigations. Plaintiffs' counsel stated in open court that suit would be instituted against the parties supplying such information. The persons who supplied the information did so in confidence and not with the expectation that they would be called upon to engage in litigation.

The motions should be denied. They are lacking in merit for all of the reasons advanced in our opposing papers and memoranda.

A. Donald MacKinnon

Sworn to before me this 6th day of June, 1960.

Louis A. Wolf, Notary Public, State of New York, No. 30-9723500, Qualified in Nassau County, Certificate filed in New York County, Term Expires March 30, 1962.

(Seal)

[fol. 136]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL AFFIDAVIT OF HARRY F. REED

State of Texas,
County of Dallas, ss.:

Harry F. Reed, being duly sworn, deposes and says:

I submit this affidavit in reply to the affidavit of A. Donald MacKinnon, verified the 6th day of June, 1960.

At the outset I would like to state that, although Harold J. Silver did not personally conduct all of the business affairs of MSC, INC., he was actively engaged in the business on a managerial and policy level. Thus, while I conducted day-to-day trading activities, Mr. Silver dealt with such problems as financing, branch office expansion, and so forth. I have read Mr. Silver's affidavit of May 26, 1960 and insofar as it relates to the activities of MSC, INC. (*id.*, at pp. 5-14), it is, from my own knowledge, completely accurate. More particularly, the communication time problem caused by the withdrawal of our private wire connections with NYSE member firms was the subject of frequent conferences between Mr. Silver and me after February 13, 1959. He personally consulted with telephone company representatives and arranged for the Dialaphone service referred to in his affidavit of May 26, 1960 (*id.*, at p. 13).

Although Mr. Silver, of course, did not personally transmit the teletype messages set forth in Exhibit No. 70, he was aware of the cost factors involved in the use of the Bell System National Teletypewriter Service, and we jointly compiled the list of messages and transactions set forth in Exhibit No. 70. The Bell System Service is a supplemental communication facility used in dealing in over-the-counter securities, and is an expensive tool when compared to [fol. 137] private wire facilities. Prior to February 13, 1959, MSC, INC. used toll teletype messages only when communicating with securities dealers who were not available through the vast private wire network maintained by Straus, Blosser & McDowell and other NYSE members with whom MSC, INC. had free, direct and instantaneous communication. After February 13, 1959, our severance from this network made necessary more frequent resort to toll teletype message communications. Every transaction reported in Exhibit No. 70 would have been conducted through the private telemeter wire paid for by Straus, Blosser & McDowell had such wire not been discontinued by order of the Exchange. MSC, INC. would not have incurred any of the toll charges set forth in Exhibit No. 70 had the Straus, Blosser & McDowell wire remained available to it. In addition, after February 13, 1959, I made two long distance telephone calls to Straus, Blosser

& McDowell on MSC, INC. business. If the private tele-meter wire had not been discontinued, these communications would have been transmitted over that wire and the telephone charges of \$7.10 would not have been incurred.

Defendant asserts that MSC, INC. was not in competition with NYSE member firms with whom it had private wire connections. But a share of corporate stock is not a unique property available only through one source and no other. For example, a securities dealer could purchase 100 shares of Delhi-Taylor from Merrill Lynch, Pierce, Fenner & Smith as well as from MSC, INC. It would make the purchase from the firm offering the best price. The private wire network provided MSC, INC. with the information necessary to be in competition with NYSE member firms and other dealers in over-the-counter securities. In further illustration of the competitive situation, the Court is respectfully referred to the Dallas section of the 1959 edition of "Security Dealers of North America" (Exhibit No. 67, see advertisements of Dallas, Rupe & Son, Inc., p. 1239; Dallas Union Securities Co., Inc., p. 1243; Eppler, Guerin & [fol. 138] Turner, Inc., p. 1247; Municipal Securities Company, p. 1259; Rauscher, Pierce & Co., Inc., p. 1261; Sanders & Company, p. 1264; Schneider, Bernet & Hickman, Inc., p. 1265). In soliciting the business of other securities dealers, Eppler, Guerin & Turner, Inc., an NYSE member firm, describes itself as "The Firm that *Knows* the Southwest." Rauscher, Pierce & Co., Inc., another NYSE member firm, declares: "Check with Us If It's in the Southwest." Municipal Securities Company states: "Specialists in Securities of the Southwest."

I have read the affidavit of Frank J. Coyle, verified the 23rd day of May, 1960. At pages 11 and 13 of that affidavit, Mr. Coyle, misreading my prior affidavit, asserts that MSC, INC.'s over-the-counter business actually increased after February 13, 1959. This is not true. What I did say was that through intensive efforts we brought about a small increase in our retail business in over-the-counter securities, but that our trading activity in over-the-counter securities (80% of our over-the-counter business) substantially declined. I have been informed that during oral argument defendant's counsel reiterated the misstatement, this

time referring to an increase in "retail trading" activity. There is nothing in the securities business which can be described as "retail trading." The words are mutually contradictory. The figures set forth at pp. 17-18 of Mr. Silver's affidavit of April 19, 1960 are true and accurate. In the seven months before February, 1959, MSC, INC.'s trading volume in over-the-counter corporate securities was approximately \$6,850,000. In the seven months after the NYSE ordered the discontinuance of the private wire connections between MSC, INC. and NYSE member firms, that volume had shrunk to \$3,990,000.

Harry F. Reed

Sworn to before me this 8th day of June, 1960.

Trudy Clark, Notary Public in and for Dallas County, Texas.

[fol. 139]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM DEPOSITION OF HAROLD J. SILVER

Examination by Mr. MacKinnon:

Q. Will you state your name, address, business and business address, Mr. Silver?

A. My name is Harold J. Silver. I reside at 6815 Hunters Glen Road, Dallas, Texas.

My business is Municipal Securities Company, investment bankers, at 600 First National Bank Building, Dallas, Texas.

Q. Is Municipal Securities Company, Inc. a corporation?

A. Municipal Securities Company, Inc. is a corporation.

Q. Can you tell me what State it was organized in?

A. In the State of Texas.

Q. Who are the officers thereof?

A. At this time the officers are Harold J. Silver, president; Evelyn B. Silver, secretary and treasurer, Mr. Louis Stayart, vice-president.

Q. Are those the only officers?

A. I believe those are the only officers.

Q. Who were the officers in 1958 as distinct from the present time?

A. There was a gentleman by the name of D. Edward Walton, who was a vice-president.

Q. What is Municipal Securities Company?

A. A proprietorship.

Q. Who was the owner thereof?

A. I am.

Q. And were you during 1958 and 1959?

A. I have been the owner since inception.

Q. What was the date of inception?

A. September 1, 1956.

Q. What was the nature of the business of Municipal Securities Company?

A. They act as underwriters, dealers and distributors of municipal bonds.

Q. Has Evelyn B. Silver any relationship to Municipal Securities Company?

A. She is my wife.

Q. I understand that.

A. And under the community property laws in the State of Texas, I presume she probably owns half of it.

[fol. 140] Q. Does Municipal Securities Company continue to do business?

A. At this time?

Q. Yes.

A. Yes.

Q. I am not now talking about the corporation, I am talking about Municipal Securities Company as distinct from Municipal Securities Company, Inc. Both of them are doing business?

A. No, that is not true.

Q. I am trying to find out the fact. When did Municipal Securities Company cease doing business?

A. Municipal Securities Company, the proprietorship, is still doing business. Municipal Securities Company, Inc., the corporation, has not done any business, I would say, since September of 1959, when Mr. Harry Reed, who was

managing it, resigned because it was impossible for him to continue doing business under the circumstances.

.

Q. When, for the first time, did you have any private wire facilities with any member firms of the New York Stock Exchange?

Mr. Dickstein: When you say you, you are referring to any of the plaintiffs?

Q. I am referring to Municipal Securities Company, Municipal Securities, Inc. and I would like the witness to specify which.

A. Probably in September 1956 or shortly thereafter there was a private wire between Municipal Securities Company and Merrill Lynch, Pierce, Fenner & Smith in Dallas.

Q. Did you make any application to the New York Stock Exchange for the approval of that wire service?

A. We did not. We assumed that whatever was necessary would be done by Merrill Lynch.

Q. But you did nothing?

A. We did nothing. We were not aware of the fact that we had to do anything.

Q. When did you learn that for the first time?

A. When Harry Reed came with Municipal Securities [fol. 141] Company, Inc., he seemed to know more about the corporate end of the business and he handled the details in connection with the applications for the continuous stock quotation service and for any of the private wires that came into Municipal Securities Company, Inc.

Q. Can you fix the date when Mr. Reed came with you?

A. Mr. Reed came the end of May or the beginning of June 1958 is when Mr. Reed came with Municipal.

Q. Had you made any inquiries as to whether or not it was necessary to receive New York Stock Exchange approval prior to that date for the connection of a private wire with a member firm?

A. I personally had not made any inquiries.

Q. Had you given any instructions to any of your staff to make such inquiries?

A. And I had not given any instructions to any of my staff to make such inquiries.

Q. When you made whatever connection you made with Merrill Lynch, I think you stated, was that pursuant to an oral or a written agreement?

A. With whom?

Q. Between Municipal Securities and I think this is not the corporation, if I understand your testimony correctly.

A. That is right.

Q. And Merrill Lynch?

A. I believe what probably happened is that Mr. Walton, who was in charge of the Municipal Department of Municipal Securities Company, made the arrangements over the telephone with Merrill Lynch and, at the same time, I think we had a private wire to several different banks in town. I don't recall the others, but perhaps my records would disclose it, if you wish it.

Q. I am only interested in the member firms. I am not interested in any banks. I am interested in member firms.

A. Rauscher, Pierce was another one that had a wire to Municipal Securities Company.

Q. As of what time?

A. This was back in, I would say, probably in late 1956 or 1957. I couldn't give you the exact date, but this was to the company and this would be prior. Now, how much prior I couldn't tell you, prior to the installation of the [fol. 142] wires to the corporation, which were applied for under Mr. Reed's direction.

Q. Rauscher—

A. Dallas Union Securities.

Q. With respect to Rauscher, did you apply for permission?

A. I do not recall whether we did or not.

Q. Have you any documents that show that you made any application for private wire tie-up with that firm?

A. I don't believe we have.

Mr. Dickstein: By application you mean application to the New York Stock Exchange?

Q. To the New York Stock Exchange.

A. I don't recall signing any.

Q. Did you make any inquiry as to how you were to get the private wire with Rauscher?

A. I personally did not.

Q. Who handled the matter?

A. It was undoubtedly handled by one of the men in the office.

Q. Do you recall what man?

A. I would not know.

Q. What is the third one?

A. The third one is Dallas Union Securities. Are they members, yes, it says so.

Mr. Dickstein: Dallas Union Securities Company is a member firm of the New York Stock Exchange.

Mr. MacKinnon: When did it become such?

The Witness: I wouldn't know.

Q. Did it become such in 1956, you say you had a tie-up with them in 1956?

A. I am not sure it was 1956, it may have been subsequent to that time. I know it was prior to the formation of the corporation.

Q. Let me get myself straight on the record. What was the earliest private wire connection Municipal Securities Company had with any member firm of the New York Stock Exchange?

A. Without further reference to other records—

Q. Refer to any records you have?

A. I don't think I have them here. I would say it would be sometime in late 1956, probably.

[fol. 143] Q. That would be Merrill Lynch?

A. I think it was Merrill Lynch and Rauscher, Pierce.

Q. In connection with that tie-up, wire tie-up, you did not file an application?

A. I do not recall that we did.

Q. Who was the second or what was the second wire house that you tied up with?

Mr. Dickstein: You mean the third, Mr. MacKinnon?

Q. No, the second. We have Merrill Lynch now and we are trying to reorient this thing.

A. Rauscher, Pierce and that may have been about the same time.

Q. And did you make any application to the New York Stock Exchange for the tie-up of a private wire to that firm?

A. No, sir, not to my recollection.

Q. What was the third query?

A. The one to Dallas Union Securities was installed sometime in May of 1958, approximately.

Q. With what outfit, that is was it with Municipal Securities Inc. or Municipal Securities Company?

A. This was to the Municipal Securities Company.

Q. Did you apply to the New York Stock Exchange for permission to have that private wire connected with Municipal Securities Company?

A. Not to my recollection.

Q. Did you have any other tie-ups, private wires with member firms of the New York Stock Exchange prior to the date that you did make application and when I say you, I am speaking now of Municipal Service Company, Inc.

A. You are talking about the corporation?

Q. That is right.

A. The corporation had no tie-ups with any member firm except those that were the result of the application.

Q. Did the Municipal Securities Company have any other tie-ups with member firms prior to the time that the application was filed by the corporation, Municipal Securities Corporation, with the New York Stock Exchange?

A. None other than I can see here.

Q. That is the three that you have mentioned?

A. Yes.

Q. In connection with those three tie-ups, no application was made by Municipal Securities to the best of your knowledge?

A. That is correct.

Q. To the New York Stock Exchange; is that correct?

A. That is correct.

• • • • •

Q. When did Municipal Securities Company, Inc. discontinue doing business?

A. In September 1959, I would say about September of 1959.

Q. September of 1959?

A. Yes, sir.

Q. At the time that you made application on behalf of Municipal Securities, Inc. for private wire and continuous ticker quotes to the New York Stock Exchange, was Municipal Securities Company doing business?

A. Municipal Securities Company, the proprietorship, yes, sir.

Q. Did it at that time have private wires with Merrill Lynch, Rauscher and Dallas Union?

A. Yes, sir.

Q. How intimately were you connected with the affairs of Municipal Securities Company; was it a daily chore of yours or was it something that you gave little or no attention to?

A. It was not a daily chore of mine.

Q. Who ran its affairs?

A. At that time, a Mr. Walton.

Q. What is his full name, please?

A. D. Edward Walton. I think his first name is Dennis, was primarily in charge of the affairs of Municipal Securities Company. Assisting him was Mr. Stayart and Mr. Hagberg.

Q. Were they all employees of the Municipal Securities Company?

A. They were all employees of Municipal Securities Company, the proprietorship.

Q. When Municipal Securities Company, Inc. was organized, were you devoting more time to the securities [fol. 145] business?

A. I devoted more time to the securities business with the organization of the corporation.

Q. Will you fix that date, please?

Mr. Dickstein: Are you asking for an actual date of incorporation?

Mr. MacKinnon: Yes, when he started going to work, I take it.

A. Approximately June 1958.

Q. Prior to the organization of Municipal Securities Company, Inc., was Mrs. Silver, Evelyn B. Silver, engaged in the activities of Municipal Securities Company?

A. She was engaged in the activities of Municipal Securities Company in terms of activities other than the buying and selling of municipal bonds. Municipal Securities Company, in addition to buying or selling municipal bonds and underwriting them, was also interested in any other situation where it could function as an investment banker.

Q. That is loaning funds?

A. Either lending funds or securing funds for people acting as an intermediary.

Q. Mrs. Silver was engaged in that type of activity?

A. She was engaged in that type of activity, but did not do anything with the municipal bond business, since she knows nothing about it.

Q. Was she paid a salary with Municipal Service Company?

A. She was paid a—there was a check drawn every 15th and 30th to her, but it went into our joint account and we didn't consider that as a salary to her or as a salary to me, it was a drawing, as you know in the case of a proprietorship, you don't pay yourself salary, to the proprietors.

Q. Nevertheless, she did receive a check on the 1st and 15th of the month?

A. That is right.

Q. From Municipal Securities Company?

A. That is correct.

[fol. 146] Q. What did she do for that salary?

Mr. Dickstein: Objection as to form, for the check which she drew.

A. It was not a salary, as I explained to you.

Q. What did she do for the proceeds of the check?

A. She didn't necessarily do it for the check. She would have done it had she not received the check.

Q. What did she do, she carried on negotiations?

A. She would carry on negotiations.

Q. Did she, during this period?

A. Yes, she did.

Q. Did she originate business?

A. She tried to.

Q. When the corporation was organized, which I think we used as sometime in June of 1958, Mrs. Silver became secretary-treasurer?

A. Yes, sir.

Q. What functions did she carry on in Municipal Securities Company, Inc.?

A. None.

Q. She did nothing?

A. She did nothing. She may have signed a check if everybody else who could sign checks was not around to sign it, but she did nothing for Municipal Securities Company, Inc.

Q. Was she paid a salary?

A. She was not paid a salary.

Q. Who were the officers of Municipal Securities, Inc. aside from yourself?

A. Mr. D. Edward Walton was a vice-president, Mr. Stayart was a vice-president and assistant secretary, I believe. I do not recall if Mr. Hagberg was a vice-president or not. I would have to have the corporate records, and Evelyn B. Silver was secretary-treasurer.

Q. Was she also a director?

A. She was also a director. There were three directors.

Q. Who were they?

A. Mr. Silver, Mrs. Silver and Mr. Walton. May I add this: Mr. Stayart did not become an officer until subsequent to these applications and neither did Mr. Hagberg.

[fol. 147] Q. Had you been trained in the securities business?

A. No, sir.

Q. Prior to the organization of Municipal Securities Company?

A. No, I had not been trained in the business.

Q. You had not?

A. No.

Q. At the time that you executed Defendant's Exhibits 4 and 6 for identification, did you have any discussion with anyone as to the necessity of applications being made to the New York Stock Exchange?

A. At the time this was done, Mr. Reed advised me that this was necessary and that he would be taking care of the necessary details of the applications to the New York Stock Exchange.

Q. Is that the first time you learned that it would be necessary to apply or make formal application for continuous ticker service?

A. That is true.

Q. Is the same true with respect to private wire connection?

A. That is true.

Q. At or about that time did you make application to the New York Stock Exchange for approval of the private wire connections which you say existed between Municipal Service Company, Merrill Lynch, Rauscher and Dallas Union?

A. No, I did not. I assumed that whatever approval was necessary had been obtained by the other parties.

Q. Other parties of what?

A. To the wire.

Q. What do you mean when you say other parties?

A. Such as Rauscher, Pierce, Dallas Union and Merrill Lynch. I assume if there had been approval that was necessary, they would have obtained it.

Q. When you executed Defendant's Exhibit 6, you knew you were making application, did you not, for approval of private wires to member firms?

A. That is true.

Q. Do you notice in the list of private wire connections for which Municipal Securities Company, Inc. was asking [fol. 148] approval was Rauscher, Dallas Union and Merrill Lynch?

A. Yes, sir.

Q. Weren't you apprised by that fact that it was necessary to make application for private wire approval?

A. That did not necessarily follow in my mind.

Q. It did not?

A. No.

Q. Did you think that only because Municipal Securities Company was a corporation that you had to apply to the New York Stock Exchange?

A. No, I did not think that. In fact, I did not try to break it as to this is the reason or that is the reason.

Q. Why did you believe it necessary to execute Defendant's Exhibit 6 on behalf of Municipal Securities Company, Inc. when you had not executed a similar application for the sole proprietorship, Municipal Securities Company?

A. Because I was so advised by Mr. Reed, that this was necessary to be executed to get the wire service and to arrange for the private wires between the other member concerns and ourselves.

Q. Did you bring up with Mr. Reed the fact that you had not applied for a private wire connection on behalf of Municipal Securities Company, the sole proprietorship?

A. No, I did not bring it up and, in fact, I did not even connect the two. It didn't ring a bell to me that we had not applied several years before. The two just did not line up side by side.

* * * * *

Q. Had Mr. Reed been an employee of Municipal Securities Company, the sole proprietorship?

A. No, sir.

Q. He had not?

A. No, sir.

Q. Did you tell Mr. Reed that Municipal Securities Company, the sole proprietorship, had not filed an application with the New York Stock Exchange?

A. I did not tell him that. He did not ask me that—

[fol. 149] Q. And you didn't tell him?

A. And it did not occur to me to tell him.

Q. Whether it occurred to you or not, you did not tell him?

A. And I did not tell him.

Q. Did you discuss that matter with Mrs. Silver at all?

A. No, sir.

Q. Did you discuss it with any other officer of Municipal Securities, Inc.?

A. When you say that matter—

Q. The fact that you were applying for Municipal Securities Company, Inc. and you had not made an application for Municipal Securities Company, the sole proprietorship.

A. As I stated before, the fact that we had not made an application before and we were making one now was not connected at all in my mind and the matter was not discussed with anybody.

Q. Did you dictate the material that is found in Defendant's Exhibit 6 and 4, including the schedules or documents thereto annexed?

A. On Schedule 4 the front page was filled in by one of the girls, since this information was in the file. I furnished the information with reference to Mr. Harold J. Silver and Evelyn B. Silver and Mr. Walton dictated this to the girl.

Q. That is the matter relating to himself?

A. Was dictated by himself.

Q. Did you read Defendant's Exhibit 4 at the time you signed it?

A. Yes, sir.

Q. Turn to the next document, Defendant's Exhibit 6. Did you furnish or dictate any of that material?

A. No, I did not.

Q. How about the schedule annexed?

A. I did not check it since whoever typed it should have been in a better position to know whether it was correct rather than myself.

Q. You were signing the application, were you not?

A. That is true, sir.

[fol. 150] Q. You wanted that schedule to certify the true facts, did you not?

A. Yes, sir.

Q. But you didn't take the time to check it; is that correct?

A. I did not check it, sir.

Q. Did you read it before you signed it?

A. I do not recall whether I did.

Q. Did you have Mrs. Silver read either or both Defendant's Exhibits 4 or 6 at the time you signed them?

A. I did not.

Q. Do you know whether she read either or both Defendant's Exhibits 4 and 6 prior to the time you signed them or at the time you signed them?

A. I do not believe she did.

Q. My question is do you know.

A. To my knowledge, she did not read them.

Q. Mr. Silver, in paragraph Eleventh of your complaint you allege:

"In order to properly conduct its business and provide necessary and essential services for itself and its customers, said plaintiff required facilities by means of which said plaintiff Municipal and its customers could be apprised and informed as to the latest quotations of securities listed on the defendant, New York Stock Exchange, and by means of which said plaintiff, Municipal, and its customers could purchase and sell securities listed on said defendant, New York Stock Exchange, on which quotations had been so obtained."

Do you note that?

A. Yes.

[fol. 151] Q. Now then, was Municipal Securities Company, Inc. at that time a member of the National Association of Securities Dealers?

A. Yes, sir.

Q. When had it become such?

A. On July 1, 1958 we received approval of the application of the corporation to become a member of the NASD.

Q. How long did you continue as a member of the National Association of Securities Dealers?

A. The corporation is still a member of the NASD.

Q. Is the corporation functioning today?

A. The corporation is in existence today, but is not doing any business.

Q. Does it maintain its membership in the National Association of Securities Dealers?

A. Yes, it does.

Q. Has it maintained its membership for the year 1959?

A. It paid it at the beginning of 1959.

Q. Did it pay it for the beginning of 1960?

A. If it was presented with a bill, it probably paid it.

Q. So to that extent it is doing business; is that correct?

A. To the extent that it is a member of the NASD, if you call that doing business—

Mr. Dickstein: It speaks for itself.

Mr. MacKinnon: What speaks for itself?

Mr. Dickstein: It is and continues to be a member of the NASD. Whether this constitutes doing business or not,—

Q. Do you accept your counsel's statement?

Mr. Dickstein: May I complete the statement? Whether it constitutes doing business or not, I don't believe Mr. Silver can say.

The Witness: I accept that statement.

[fol. 152] Q. Is Municipal Securities, Inc. a member of any other association of securities dealers?

A. I do not believe so.

Q. Do you know whether or not Municipal Securities Company was a member of the National Association of Securities Dealers?

A. Yes, Municipal Securities Company, the proprietorship, is a member of the NASD. Also a member of the Investment Bankers Association of America.

Q. When did it become a member of the National Association of Securities Dealers?

A. Towards the end of 1955 Intercontinental Securities Company, which was a sole proprietorship, applied and became a member of the NASD. On September 1, 1956, when Municipal Securities Company was formed or, in effect, the name was changed, the membership of Intercontinental Securities Company was transferred to Municipal Securities Company.

Q. That was a change in name?

A. In effect it was a change of name, yes.

Q. What had been the business of Intercontinental Securities Company?

A. Similar to that of Municipal Securities Company, except that it was on an extremely small scale while I was looking for proper personnel to employ.

Q. Was that a sole proprietorship?

A. Also a sole proprietorship.

Q. When was that established?

A. I would say in August 1955, probably.

Q. That is your best recollection?

A. Yes, that is my best recollection.

Q. You allege in paragraph Thirteenth of your complaint:

"Thereafter, and on or about June 25, 1958, the plaintiff, Municipal, was notified by the defendant, New York Stock Exchange, that its application for continuous stock quotations service supplied by ticker had been approved, [fol. 153] and thereafter, there was installed in the offices of the said plaintiff, such stock quotations service."

Q. Did you tell you attorney that?

A. In those specific words, no.

Q. Did you tell him that you had received approval?

A. I turned over the file to him.

Q. I show you Defendant's Exhibit 5 for identification, and I ask you whether there is anything in that letter that the application had been approved or whether it says it is temporarily approved pending further investigation.

A. To quote the letter, "It has been temporarily approved pending further processing."

Q. On or about June what is the date?

A. June 25, 1958.

Q. You were apprised of that fact, were you not?

A. That is correct.

Q. Did you furnish a copy of that letter to your counsel at the time that this complaint was prepared?

A. I presume I did.

Q. Did you, at the time that you read it, call his attention to the fact that he had misstated the facts in paragraph Thirteenth?

A. I did not believe he had misstated the facts.

Q. You did not?

A. No.

Q. You believed you had received approval?

A. Yes, I believed I had received approval.

Q. Despite the fact that it was temporary pending investigation?

A. It says temporary, I thought the thing had been approved.

Q. Did you discuss Defendant's Exhibit 5 for identification with Mrs. Silver?

A. No, sir.

Q. Did you discuss it with any other officer of Municipal, the corporation?

A. I don't believe that letter was discussed with any other officer of the corporation. I don't believe it was handled other than in a routine manner, it came in and was [fol. 154] put in a file. There didn't appear to be anything that required discussion.

Q. In any event, you didn't discuss it?

A. No, sir.

Q. Did you receive a letter from the New York Stock Exchange advising you that the Exchange had given temporary approval pending further processing of your connections with the member firms listed on the page attached to the application for private wire service, Defendant's Exhibit 6?

Mr. Dickstein: A separate letter referring to private wire connections, is that what we are talking about?

I don't see one here. Do you have the date of such a letter, Mr. MacKinnon?

Mr. MacKinnon: It is at or about the same date.

The Witness: May I look at it?

Mr. MacKinnon: I haven't got it here, but I understand there was such a letter.

Mr. Dickstein: We have no copy of a letter dated on or about June 25, 1958 which purports to approve private wire connections.

Mr. MacKinnon: There isn't any such letter, as I understand it. It is temporary approval.

Mr. Dickstein: Approval permanently or temporarily.

By Mr. MacKinnon:

Q. I show you Defendant's Exhibit 7 for identification, Mr. Silver, and I ask you whether on receipt of that letter, the original of that letter, you learned for the first time

that Municipal had been given temporary approval for a continuous stock quotation service at or about June 25, 1958.

A. I did not distinguish between temporary, permanent [fol. 155] or any other kind of approval and in reading this letter, the thing that hit me was not the question whether they were removing temporary approval, but rather that they were removing approval.

Q. In other words, you read the letter, did you not?

A. I read the letter.

Q. With respect to any of the member firms that you list in the paragraphs of your complaint, Fourteenth and Sixteenth, did you have any agreements in writing with any of them, and I am speaking now about both the sole proprietorship, Municipal, or Municipal, the corporation?

Mr. Dickstein: Do you mean agreements with respect to private wire connections?

Mr. MacKinnon: That is correct.

A. I do not know of any agreements in writing with reference to private wire connections.

Q. Did you have any oral agreements with each of them or any of them and with whom?

A. Since I did not discuss the matter personally, I wouldn't know. I would have to ask the people in my organization whether there were any oral agreements or, for that matter, whether they had signed any other agreements that I have no knowledge of.

Q. You referred to Municipal. Did you ever file an application for private wire service with the New York Stock Exchange between member firms and Municipal Securities Company, the sole proprietorship?

A. To my knowledge, none was filed.

Q. Was there anybody else connected with Municipal Securities Company that would have better or more accurate knowledge than you, Mr. Silver?

A. If one was filed without my knowledge, that particular person would have more accurate knowledge.

[fol. 156] Q. Would one have been filed without your knowledge?

A. Probably one could have been filed without my knowledge if my signature doesn't appear on it.

Q. Have you any documents in your files that show such an application was filed for Municipal Securities Company, the sole proprietorship?

A. There seems to be one here which is addressed to Mr. Harry Reed of Municipal Securities Company, in which it is possible that there may have been confusion between the corporation and the proprietorship in view of the fact that Mr. Reed in his original correspondence with the New York Stock Exchange used the proprietorship's stationery, which just said Municipal Securities Company pending receiving stationery for Municipal Securities Company, Inc. He perhaps should have put an Inc. after the Municipal Securities Company, but he did not.

Q. Where is Harry Reed at the present time?

A. Mr. Reed is presently employed by Ditmar & Company, Dallas, Texas. They are members of the New York Stock Exchange.

Q. He was at no time an employee of Municipal Securities Company, the sole proprietorship?

A. No, he was not.

Q. Where is D. Edward Walton?

A. I do not know. I discharged Mr. Walton on October 19, 1959.

Q. When you say "I", you mean Municipal Securities Company, Inc. or Municipal Securities Company?

A. Mr. Walton was only an employee of Municipal Securities Company, the proprietorship.

Q. You discharged him in October of 1959?

A. In October of 1959.

Q. You don't know where he is at the present time?

A. I do not know where he is at the present time. He was an officer and director of the corporation, but not an employee.

[fol. 157] Q. You say in paragraph Twentieth of the complaint, there was a further part of the conspiracy that the defendant, New York Stock Exchange, would induce the co-conspirators, Harris, Upham & Co., Goodbody & Co., Merrill Lynch, Pierce, Fenner & Smith, Inc., Schneider, Bernet & Hickman, Inc., Sanders & Co., E. F. Hutton & Co.

Dallas Rupe & Son, Inc., Rauscher, Pierce & Co., Inc., Dallas Union Securities Co., Inc. and Eppler, Guerin & Turner to breach their aforesaid agreements with the said plaintiff, Municipal, meaning the corporation, providing for private wire connections between the offices of said co-conspirators and said plaintiff.

When were such agreements made?

A. These agreements that you are referring to here and I presume—

Q. It is not what I am referring to, Mr. Silver, it is what you referred to.

A. The agreements that you are referring to that I referred to were agreements wherein they agreed to permit the wire to exist between the two of us.

Q. When were the agreements made?

A. I presume that these agreements were made prior to the application to the New York Stock Exchange by Municipal Securities Company, Inc. for these private wire connections.

Q. Did you participate in the making of such agreements?

A. I did not personally participate in the making of these agreements.

Q. Who participated in the making of such agreements?

A. Mr. Reed. In each of these cases he would call the proper party in each of these companies and say, we would like to have this wire with you. Do you agree to it and they would say, yes, otherwise we would not have installed them between the two.

Q. Were you present when Mr. Reed made any such agreements?

A. No, I was not present.

[fol. 158] Q. Did you participate in the making of any such agreements?

A. As stated before, I did not participate. However, Mr. Reed advised me that he had been in touch with these people and they had agreed to the installation of the private wires.

Q. Were any such agreements evidenced by any writings?

A. Not to my knowledge.

Q. Have you looked to find out; have you examined your files?

A. I haven't looked for an agreement per se of that type, but the files that we had, as turned over to my attorneys, do not disclose it, so I must presume that no such agreements were made in writing.

Q. All you know about them is what Mr. Reed told you; is that correct?

A. That is correct.

Q. In paragraph Twenty-first, when you refer to the aforesaid agreements, are you also referring to agreements concerning which you testified you believe were made by Mr. Reed?

A. Yes, sir.

Q. In other words, it is the same and not different agreements; is that correct?

A. These would be the same, yes, sir.

Q. In paragraph Twentieth, to revert to it a moment, Mr. Silver, you say it was a further part of said conspiracy that the defendant, New York Stock Exchange, would induce the co-conspirators, naming certain member firms, to breach their aforesaid agreements, and that is the same agreement concerning which you testified a moment ago, is it not?

• • • • •
A. The answer to your question is yes.

Q. Who acted on behalf of the New York Stock Exchange in inducing the member firms that you list in paragraph Twentieth to breach their agreement?

A. I don't know who acted on behalf of the New York Stock Exchange.

Q. Who acted on behalf of the member firms or any of them?

A. I am not sufficiently acquainted with the personnel [fol. 159] of each of these member firms to know whose duties it would be to do this.

Q. Do you know of any personnel in any member firm?

A. I am not acquainted with them, sir.

Q. Not with any of them?

A. Not with any of the personnel to know their duties sufficiently.

Q. I didn't hear that.

A. I am not acquainted with any of the employees of the member firms to know their duties so that I could answer your question properly.

Q. In paragraph Twenty-third, are you referring to the same agreement as that concerning which you testified or to another agreement?

A. Twenty-third is with reference to the agreement between Municipal Securities Company, Inc. and Straus, Blosser & McDowell.

Q. Was that agreement oral or in writing?

A. That was an oral agreement.

Q. Who acted on behalf of Municipal?

A. Mr. Harry Reed.

Q. Who acted on behalf of Straus, Blosser & McDowell?

A. I don't know if I could exactly answer that. I would have to ask Mr. Reed with whom he had his discussions. Perhaps our files disclose that.

Q. Did you participate in the making of any such agreement?

A. Only to the extent of knowing of its existence.

Q. Who told you that such an agreement existed?

A. Mr. Reed.

Q. Were you present when the parties came to the agreement?

A. No, sir.

Q. All you know is what Mr. Reed told you; is that correct?

A. That is correct, sir. Also, I do know that the teletype connection was installed pursuant to what Mr. Reed said and things went on normally, so I must assume the agreement was effected.

Q. I don't know whether I understand you, Mr. Silver.

[fol. 160] Mr. Dickstein: I think what Mr. Silver said is that he had personal evidence of the implementation of such agreement.

Q. That you had knowledge of the implementation of such agreement?

A. Yes, by virtue of the fact that the teletypes were installed in the office.

Q. Did you have any writings with respect to it?

A. As I said before, I did not have any writings.

Q. Mr. Reed was the only person that had any contact with him?

A. Yes, sir.

Q. You were not present when there were any discussions between Straus, Blosser & McDowell and Municipal; is that correct, meaning the corporation?

A. That is true. I might add this: that on occasion I visited the office of Straus, Blosser & McDowell in New York and spoke with Mr. Seligman, who was in charge there—

Q. When was that?

A. After the installation of the teletypes.

Q. Can you fix an approximate time?

A. Not at this moment.

Q. Was there any discussion between you and Mr. Seligman about an agreement between Straus, Blosser & McDowell and Municipal?

A. As best as I recall, there was a discussion that he was very happy with the arrangements.

Q. Did he tell you what the arrangements were?

A. We didn't go into that, sir. He was getting a bit of business and he was very happy with it.

• • • • •

Q. You refer in paragraph Eighth to Dallas Union Securities Company, Merrill Lynch and Rauscher, Pierce; do you see that allegation? We are now talking about the sole proprietorship.

A. Yes, sir.

[fol. 161] Q. Did member firms of the New York Stock Exchange furnish quotes on municipal bonds and on municipal securities?

A. I presume they furnished them to us and we would furnish them to them if such information was required.

Q. Do you know that they did run quotes on municipal securities, any of the three houses you mentioned, namely, Dallas Union Securities, Merrill Lynch or Rauscher, Pierce?

A. Are you assuming that it is customary to have quotes on municipal securities?

Q. I am not assuming anything. I am asking you a

question. You have made various allegations, Mr. Silver. I am asking you whether these houses furnished to you on this private wire service, which you said you had with them, quotes on municipal securities.

A. They furnished us quotations and we furnished them quotations, if either of the parties requested it.

Q. On municipal securities?

A. On municipal securities as I—

Q. I am talking about Municipal Securities now because I called your attention to paragraph Sixth and you told me that the sole proprietorship was engaged in purchasing and selling certain types of unlisted securities, principally municipal bonds; is that correct?

A. Yes, but there are other types of unlisted securities and if information was required with respect to them, I presume they would also be furnished.

Q. Did either of—any of the firms that you have mentioned in paragraph Eighth, namely, Dallas Union, Merrill Lynch and Rauscher, Pierce, furnish you a private wire service with respect to quotes on municipal bonds or municipal bonds or municipal securities?

A. As I have stated before, if we required information with respect to quotations or if they did from us, it would be handled on that private wire.

[fol. 162] Q. In other words, you used the private wire rather than using a non-private wire in communicating with them; is that correct?

A. If the private wire was available, that certainly would be used in preference to a non-private wire.

Q. Do you know whether or not the New York Stock Exchange furnished any listing of prices with respect to municipal securities and unlisted securities?

A. To my knowledge, the New York Stock Exchange does not list municipal bonds.

Q. Do they quote municipal bonds or do they quote unlisted securities?

A. To my knowledge, they do not.

Q. Will you read paragraph Tenth, Mr. Silver, please?

A. I have done so.

Q. That paragraph refers to the business that Municipal, Inc. was engaged in; is that correct?

A. Yes.

Q. Did you know or did you ascertain whether the New York Stock Exchange was furnishing quotes with respect to corporate securities, namely, corporate stocks and bonds at the time that you read the complaint?

A. Yes, sir.

Q. What did you find in that regard?

A. That the New York Stock Exchange furnishes quotes with respect to corporate securities listed with them.

Q. At that time did you make any inquiries to ascertain whether or not they furnish quotes with respect to securities that were not listed with them?

A. I did not so ascertain. I presume they did not furnish quotes with securities that are not listed with them.

Q. Will you read paragraphs Sixteenth and Seventeenth of the complaint, please, Mr. Silver?

A. Yes, sir. I have done so.

Q. You make reference in paragraph Sixteenth to a teletype service; is that correct?

A. Yes, sir.

[Col. 163] Q. With whom was that teletype connection?

A. With Straus, Blosser & McDowell.

Q. When was that teletype connection first made, do you know?

A. I can determine that from the record. During October 1958.

Q. October of 1958?

A. Yes.

Q. Did you make application to the New York Stock Exchange for the tie-up of that teletype?

A. I don't recall if we did or whether Straus, Blosser & McDowell did. Perhaps our records would indicate it.

Q. Who requested that there be a teletype connection between whatever entity and what was the entity, Mr. Dickstein, was it Municipal, Inc. or the sole proprietorship?

A. It was Municipal, Inc.

Q. Who requested a teletype as distinct from a private wire?

A. As I recall, Mr. Harry Reed had discussions with various firms who were members of the New York Stock Exchange with respect to the installation of a teletype or telemetering teletype in order that listed business be handled through that particular firm. The arrangements would normally be we would give them this listed business, which would come to us through our customers, they would do their best to execute these orders to the best of their ability and in return, they would do what ever they can in connection with over-the-counter securities in which we had an interest for our customers or in general trade.

Q. Were you present at the time that agreement was made?

A. I was not present at the time that agreement was made.

Q. Did you participate in any way in the making of that agreement?

A. I had no discussions with Straus, Blosser & McDowell. I participated, I suppose, to the extent of Mr. Reed reporting to me that these were the circumstances, there were the advantages of each of these particular firms and the decision was then made based on the information he gave [fol. 164] me that perhaps Straus, Blosser & McDowell would be the one to choose.

Q. Was that agreement reduced to writing?

A. I don't believe that it was.

Q. In other words, your best recollection is--

A. I have no knowledge of a written agreement with respect thereto.

Q. Do you know what portion, if any, of your business that concerned-listed securities was to be diverted to Straus, Blosser?

A. I believe that in actual practice the major portion of it was probably diverted to Straus, Blosser.

Q. Was that a matter of agreement?

A. Yes. We were under no obligation to give them all our business, but I believe the understanding was that they would get a substantial part of it.

Q. Have you any recollection as to whether there was any understanding or agreement as to the percentage?

A. I know of no agreement as to the percentage of the total business.

Q. Did you ever call to the attention of the New York Stock Exchange that you had a teletype connection with Straus, Blosser & McDowell; did you ever call that fact to their attention? I am not now talking about an application, I say did you ever call that fact to the attention of the New York Stock Exchange?

A. I do not recall having done so.

Q. If attention was called to that fact, would it have been called by Mr. Reed or by you?

A. I can't answer that, I don't know.

Q. Would you read paragraph Twenty-third, please, of your complaint?

A. I have read it.

Q. Will you state in what manner the New York Stock Exchange induced Straus, Blosser & McDowell to do anything with respect to what you have alleged is an agreement with respect to a teletype?

A. As I recall, Mr. Reed came into the office and told me that he had received a call from Straus, Blosser stating that they had been told by the New York Stock Exchange [fol. 165] to discontinue the teletype service.

Q. Can you fix the date when he told you that?

A. It was the date February 13, 1959.

Q. Were you present in any conversation with any representative of Straus, Blosser & McDowell and Mr. Reed when that message allegedly was relayed to Mr. Reed?

A. No, I was not present when that message was relayed. I do not recall being present at any rate.

Q. The only thing you know about it is what Mr. Reed told you about it; is that correct?

A. That is correct.

Q. Would you read paragraph Twenty-fourth of your complaint?

A. I have done so.

Q. Will you continue with Twenty-fifth and I will ask you this in my next question with respect to both?

A. I have done so.

Q. What acts, if any, did the New York Stock Exchange do to prevent Municipal, I am now speaking of the sole proprietorship from exercising an essential and necessary part of its local trade? My question is confined to the sole proprietorship.

A. By having the private wires between Dallas Union Securities Co., Merrill Lynch and Rauscher, Pierce discontinued and removed from between our offices and theirs.

Q. Those private wires were used, were they not, solely between yourself, meaning the sole proprietorship, and the three firms that you have mentioned in connection with municipal securities, municipal bonds and unlisted securities?

A. That is correct, sir.

Q. You are aware, are you not, that the New York Stock Exchange does not carry on its wires any quotes with respect to municipal bonds or unlisted securities?

A. I am aware of that, but then why did the New York Stock Exchange have them discontinued those wires?

Q. You are aware of the fact that I asked you that they do not carry quotes of municipal bonds or unlisted securities over their wires?

A. I am aware of the fact that the New York Stock [fol. 166] Exchange does not furnish quotations in connection with municipal securities or unlisted stocks.

Q. How did the New York Stock Exchange or what act of the New York Stock Exchange—and I am directing myself now to paragraph Twenty-five—prevent Municipal, the sole proprietorship, from rendering whatever business it had with its customers in interstate commerce?

A. By having the private wire connections removed between the three companies and ourselves, it was more difficult to transact business involving either Texas municipals or out-of-State municipals or any unlisted securities in which we were transacting business.

Q. Were you not able to receive the same information, which you had received over private wires, over other than private wires between those three houses or any other houses?

A. In a much more inconvenient way, it could be done.

Q. But it was possible to do it?

A. It ~~would~~ be possible to use the regular telephone service to call them, but the time element involved might be entirely to our disadvantage.

Q. With respect to Municipal, Inc., the corporation, what acts did the Stock Exchange do which prevented plaintiff from exercising a necessary part of its business?

A. The New York Stock Exchange, by removing the private wire connections between the member firms and the corporation, by removing the teletype service between Straus, Blosser & McDowell and the corporation, and by removing the ticker quotation service did so.

* * * * *

Q. Mr. Silver, it was true, was it not, that whatever bids or whatever orders you received for listed securities you were able to place with members of the New York Stock Exchange after the removal of the wire as you had done prior thereto?

A. They could be placed, but we would not be doing our customers—we would not be giving our customers the best [fol. 167] service because of the time elements involved. It may take more time and, sometimes substantially more time, to execute an order that way between the time we receive it and its execution than if we could use a private wire.

Q. That is the time element, the difference was the time element?

A. In this particular case, yes. I might add the time element could, of course, affect the price.

Q. What acts did the New York Stock Exchange do that prevented Municipal, the corporation, from rendering business to its customers in interstate trade?

* * * * *

A. I will give you an example of that. We dealt in over-the-counter securities in which we would make our arrangements to either buy or sell them through the wire between Straus, Blosser & McDowell and ourselves. Straus, Blosser & McDowell were located in New York, we were in Dallas. We would then perhaps be buying from another firm located in New York to which Straus, Blosser & McDowell

had a direct private wire. If we couldn't do that, it was impossible from a practical viewpoint to do business with that particular firm in New York. It would be costly to make a telephone call, it would be costly to have private wires to each of these New York concerns and it was much more desirable and certainly was the logical way and the normal way and the natural way in which other concerns do business of this type by having one direct wire to a concern into New York and they would have perhaps twenty, thirty, some have a hundred wires to other over-the-counter houses in New York City.

Q. This was all with respect to unlisted securities; is that correct?

A. This is specifically with respect to unlisted securities. The listed securities would be done with Straus, Blosser & McDowell who would then check with their man, I presume, on the floor or whichever way it was executed, or if we did a listed piece of business with Rauscher, Pierce, [fol. 168] I think they had a direct wire into New York and it would probably be executed through that wire.

Q. Did Straus, Blosser have a Dallas office?

A. Not to my knowledge.

Q. Not to your knowledge?

A. No.

Q. Do you know with what office of Straus, Blosser your Municipal, the sole proprietorship, and then Municipal, the corporation, was connected?

A. Their New York office. Their office on—

Q. That is all I want to know. It was their New York office?

A. Yes, sir.

Q. There isn't any doubt in your mind on that?

A. No. I have visited their office in New York.

Q. I am quite sure that practically every brokerage firm that I know have offices all over creation. I don't know how many they have in Dallas, but if they haven't got an abundance of them, it would be the first city that I know of.

Q. You say that all of the acts were done without just cause or provocation; is that correct?

A. Yes, sir.

Q. All of the acts done by the New York Stock Exchange?

A. Yes, sir.

Q. Do you believe that the New York Stock Exchange is required to have its facilities available for people who are running a sole proprietorship or a corporation that do not have security clearance?

A. I think it has nothing to do with it.

Q. You think it has nothing to do with it. Is it your opinion that the New York Stock Exchange must give its facilities to anybody that asks for them?

A. May I ask my counsel a question?

A. Yes, I think it is a public service and should be given to anybody that asks for them. This is my opinion.

[fol. 169] Mr. McKinnon: Very well, that is all right, that is all I wanted.

Q. I show you Defendant's Exhibit 6 for identification, which was marked yesterday, and I ask you to read paragraph 6 thereof.

A. I have read paragraph 6 thereof.

Q. Had you observed that at the time that you signed the exhibit?

A. I do not recall.

Q. It is being called to your attention by me for the first time?

A. I do not know.

Q. What is your best recollection?

A. My best recollection is I don't know.

Q. Does not Defendant's Exhibit 6 for identification provide in pertinent part, "We," meaning Municipal Securities Company, Inc., "agree that the wire or other connections and the furnishing of quotations to us shall be discontinued whenever you" meaning the New York Stock Exchange, "shall withdraw approval thereof."

The Witness: I didn't hear it.

(The question was read.)

A. I am not an attorney and can't interpret a contract, but—

Q. Can you read it?

A. I can read it, yes, sir. Shall I read it?

Q. I just pointed it out to you. What does that say?

A. Yes, it says that.

* * * * *

Q. Subsequent to the removal of the private wires, did Municipal, the sole proprietorship, continue to do business?

A. It continued to do business, but with some difficulties.

Q. That continuance of business or that business has continued down to date; is that correct?

A. The business is still in existence, however, we have closed all our branch offices.

[fol. 170] Q. Where did you have any branch offices in 1958 and 1959?

A. Lubbock, Texas; Amarillo, San Antonio, Texas and Longview, Texas.

Q. Is that all?

A. Those were all the offices we had.

Q. Were they all offices of Municipal, the sole proprietorship?

A. Municipal, the sole proprietorship, conducted business in all of them and Municipal, the corporation, conducted business primarily in Dallas and in San Antonio.

Q. Did Municipal, the corporation, continue to do business after the wire service and the ticker service was discontinued?

A. It did. It tried to continue in business but found that it was increasingly difficult, if not impossible, to do so.

Q. Has it continued to do business down to date?

A. No, it has not.

Q. When did it cease doing business?

A. I would say the last time it did any business was in September 1959.

Q. September of 1959?

A. Yes.

Q. At that time was its office closed?

A. Yes, all of its business in San Antonio had been discontinued and the office in San Antonio was still being

partially used by the proprietorship because there was a lease in effect and we had to pay rent anyway, but there were no employees of the corporation there—give me the question.

(The question was read.)

A. —the office in Dallas, used by the corporation, was taken over by the proprietorship, all of the services being used by the corporation was discontinued and in general, the corporation became completely dormant in terms of business on or about the middle of September.

Q. During the period February to September 1959, that is the period after the wires were pulled and the cessation of business of Municipal, the corporation, did Municipal, the corporation, do business in connection with listed and unlisted securities?

A. It tried to.

[fol. 171] Q. Did it continue to place orders for listed business?

A. I believe it did some, yes.

Q. With what member firms did it place business?

A. I couldn't tell you without referring to the records.

Q. Have you got such a record?

A. I am sure we could find it.

Q. Will you produce it for your counsel, so that he can make it available to me?

A. I will be very happy to.

Q. After the discontinuance of the wires, did Municipal, the sole proprietorship, continue to participate and sell and distribute municipal securities and unlisted securities?

A. It did and it still does. However, I must say that on a number of occasions we were specifically told we couldn't participate in an account because, obviously, there was a problem, the New York Stock Exchange pulled our wires and in general there was a hesitancy on the part of people in the business to do business with us.

Q. Subsequent to the discontinuance of the wire service with respect to Municipal, the sole proprietorship, was business handled with any of the member firms of the New York Stock Exchange with respect to any municipal security purchases?

A. I am reasonably certain we did business with them.

Q. Can you tell me with what member firms you did business?

A. The information can be obtained for you, sir.

Q. What customers did Municipal, the corporation, lose that it had prior to the time that the wire service was discontinued?

A. Since it's gone out of business, it has no customers.

Q. That is all right. My question still is what customers did they lose.

A. All of them.

Q. Then I will have to ask you what customers did they have before the wires were pulled and what customers were lost thereafter.

[fol. 172] Mr. Dickstein: By individuals' names?

Q. You told me that they did business with you or continued to do business from February to September. You allege in your complaint that you lost customers.

A. That is right, by the time September rolled around, we had no business left.

Q. You may have one version of that and somebody else may have a very different version.

A. I am giving you my version.

Q. The point that I make is, you say you lost customers. I want to know what customers you lost. This is a specific allegation?

A. Customers cover two categories. People you do business with in effect on a wholesale basis and those whom you do business with on a retail basis.

Q. Municipal, the corporation, didn't do any business with anybody on a wholesale basis, did they; the corporation I am talking about now?

A. Yes. You are talking about the corporation. I presume, now to divide the question of wholesale. As I recall, you discussed wholesale before as opposed to retail.

Q. That is right.

A. And we will refer to retail business as business with individuals or customers and wholesale business as business with other dealers wherein—

Q. Underwriters.

A. —where we would take a position in a security and in effect hold it for retail to other dealers or to individual customers.

Q. Did the corporation do both?—

A. The corporation did both and I would say a greater part of the volume of the corporation was probably in its business with other dealers rather than with retail customers. Business with other dealers disappeared rather quickly with the discontinuance of the wires because it was impossible to work with them. You couldn't—normally [fol. 173] when you are dealing in that type of business, you must be in a position to very quickly get quotations from the other dealers in the business. You flip a key, somebody gets on and you ask him the question, he answers it. You either do business or you don't or you flip another key and see how your markets are going.

Now, with the discontinuance of these wires, the wholesale business, as such, rapidly went down.

Q. All right.

A. With perhaps an exception in a security where we may have had a big position and people came to us for it because of that factor, but once that was gone, that was gone.

Q. Let's cover the retail. What customers did you lose in retail?

A. By the same token, it is a little more difficult to make a generalization on the retail without having specific records in front of me. The retail business, as I say, was a smaller portion of the business and the retail business was inevitably intertwined with listed business. If a man dealt with you, he would like you to take care of all of it. We made no money at all on listed business.

Q. You were not a member firm, were you?

A. That is correct.

Q. So you couldn't expect to make money, could you?

A. We did not expect to make money. I am merely mentioning this, but we did it as a service to our customers and when we were unable to provide that service, it was difficult to continue doing some of the over-the-counter business with them because then they would have to do business

with two people and again their inclination was to do business with one firm rather than with two firms.

Q. Would you again turn to Municipal, the sole proprietorship?

A. Yes, sir.

Q. And tell me what business you lost after the discontinuance of the wire service.

A. It would be difficult to enumerate the business you [fol. 174] lose. The only thing that happens is that people do not call you as much over the regular telephone wire as opposed to the private wire connection, so if there is a deal going or if they can do business with you on a certain issue as opposed to doing business with one with whom they have a wire connection on a certain business, this inclination is to use the private wire connection because it is quicker, easier and less cumbersome. I couldn't tell you how much business we lost there, it may have been a huge sum.

Q. As far as listed business is concerned, Mr. Silver, Municipal, Inc. lost none because it did not do a listed business, did it?

A. I think I answered that question before.

Q. That you made no money on it?

A. We made no money on listed business, but that it was very closely tied up with our over-the-counter business.

Q. In other words, you tried to use it as a feeder; is that correct?

A. As a what?

Q. A feeder.

A. What is a feeder?

Q. If you don't know, I can't elaborate.

Mr. Reilly: Come on.

A. The term isn't—

Q. No, it isn't a very good term. It isn't a come-on.

A. We gave that as an additional service to our clients and it was necessary to the extent that in order to get their other business, we provided the service because, as stated before, the over-the-counter business and the listed business of any one individual retail customer would normally go hand in hand.

Q. Have you compiled a list of the customers that you lost, Municipal, the sole proprietorship, and Municipal, the corporation?

A. I have not compiled a list of the customers we had or lost or might have had.

[fol. 175] Q. When we are dealing with might have had, I am eliminating that, that is prospective. I want to know whether you compiled a list of customers that you had and lost, Municipal, the sole proprietorship, and Municipal, the corporation.

A. I have not compiled such a list.

Q. Can such a list be compiled by you?

A. We can try.

Q. Will you do so?

A. I will try to do so.

Q. You have alleged in paragraph Twenty-eighth of the complaint, will you read it, please?

A. Yes, sir.

Q. Twenty-eighth and twenty-ninth, that you were damaged, meaning Municipal, the sole proprietorship, and Municipal, the corporation, was damaged to the extent of \$500,000; is that correct?

A. In Twenty-eighth it is alleged that Municipal, the proprietorship—

Q. The sole proprietorship.

A. —was damaged to the extent of \$500,000.

Q. And the next one, Municipal, the corporation?

A. That is Twenty-ninth; yes, sir.

Q. Have you compiled an item or items as to how you make up the \$500,000 in each instance?

A. No, sir, I have not compiled item or items.

Q. Have you made any computation for Municipal, the sole proprietorship, or Municipal, the corporation, that shows damages of \$500,000?

A. I have not made such a computation.

Q. Has anybody made such a computation in your behalf?

A. Not to my knowledge.

Q. How, then, did you choose the figure of \$500,000 to be embraced in your complaint?

A. It was an educated guess.

Q. Will you tell me how you arrived at your educated guess for Municipal, the sole proprietorship, and Municipal, the corporation?

A. I asked myself, Harold, how much do you think this [fol. 176] may have caused you in terms of damage and I said approximately a half a million dollars.

Q. Is that the way you arrived at it?

A. That is the way I arrived at it.

Q. You made no computations of any kind or character?

A. I made none.

Q. Did Municipal, the sole proprietorship, file income tax returns?

A. The proprietorship does not file an income tax return. The business involved in the proprietorship is incorporated in my income tax return.

Q. That is Harold J.'s?

A. That is correct.

Q. Was there embraced in that tax return a schedule showing the results of the operation of Municipal, the sole proprietorship?

A. In my tax return there is embraced information with respect to the operations of Municipal Securities Company, the proprietorship.

Q. Will you produce those tax returns for the periods prior and subsequent?

Mr. Dickstein: The returns or the schedules?

Mr. MacKinnon: I want the information. I have no interest to make any inquiries into Mr. Silver's personal life.

Mr. Dickstein: Schedules C's on the proprietorship.

Mr. MacKinnon: Whatever the schedule is, I don't know.

Mr. Dickstein: For what period of time?

Mr. MacKinnon: From the date of its organization down to date.

The Witness: Yes, I will. I will be very happy to provide whatever information you require.

By Mr. MacKinnon:

Q. Did you file income tax returns for Municipal, Inc., the corporation?

A. Yes, sir.

[fol. 177] Q. Will you furnish copies of those income tax returns?

A. Yes, sir.

Q. Have you paid franchise taxes on Municipal, Inc., the corporation, down to date; I think I asked you that before and I think you told me you did?

A. Any taxes with respect to the corporation are current.

Mr. MacKinnon: Now I can promise you that I will be through in the morning. It is now 5:15 and I will go on at that time and I do not think I will need Mrs. Silver.

Q. Mr. Silver, will you turn to paragraph Thirty-fourth of your complaint, please?

A. Yes, sir (referring to document).

Q. Will you read it?

A. I have read it.

Q. To what contracts do you refer in paragraph Thirty-fourth of your complaint, Mr. Silver?

A. To the oral agreements between these companies and ourselves with reference to the installation of the private wires.

Q. Can you state the terms of such agreements?

A. I believe I stated them previously, to the effect that to my knowledge, to the best of my knowledge, they concern the installation of these wires in which we agreed to give each other business, in effect, over the wires to expedite our respective business between ourselves.

Q. Were any written agreements whereby you would give any specified portion of the business to any given broker or any given member firm, rather?

A. To my knowledge, there were no written agreements.

Q. Did you specify what percentage, if any, you would give to any member firm?

A. Not to my knowledge.

Q. In other words, was that a matter of discretion on the part of Municipal, the sole proprietorship, and Municipal, the corporation?

A. As stated, I personally made none of these contracts. I do not know that any specified percentages were discussed. I was not advised of any.

Q. Have you ever seen any agreements?

A. I have never seen any written agreements with respect thereto.

Q. Have you ever looked for any such agreements?

A. I have never looked for any such agreements.

Mr. MacKinnon: Will you do so upon your return to Dallas and if there are any such agreements, produce them or have your counsel produce them?

Mr. Dickstein: Surely.

Q. Are you able to state any further the terms or conditions of any of the contracts which you allege you made with the parties named in paragraph Thirty-fourth? That is, state further than you have stated?

A. Not having made any of these personally, it would be difficult for me to make any additional statements.

Q. Did you participate in any way in the making of any such agreements or any such contracts as you there designate them?

A. No, I did not participate in them, as I have stated before.

Q. Were you present when the contracts, which you allege were made, were made?

A. No, I was not present. Had I been present I would have participated.

Q. Not necessarily.

A. Had I been present I would have participated.

Q. All right. Who carried on whatever negotiations were carried on, Mr. Reed?

A. Mr. Reed.

Q. And Mr. Reed reported to you?

A. He advised me, yes, sir.

Q. And that is the only information you have with respect to it, is that correct?

A. That is correct, sir.

[fol. 179] Q. Will you read paragraph Thirty-fifth, please?

A. I have done so (referring to document).

Q. You there state, among other things, that the New York Stock Exchange arbitrarily enticed the member firms

to repudiate what you say were agreements with Municipal, the sole proprietorship, and Municipal the corporation, and I inquire as to in what manner they enticed the member firms to do anything?

A. The facts speak for themselves.

Q. They do not to me, so I want an elaboration of what facts you have in mind. If it was a discontinuance of the service without more, you may so state. If there is something more, I want to know what it is.

A. I believe I can best answer you by saying that the communications of the New York Stock Exchange to these various member firms to discontinue their wire connections with us as well as the discontinuance of the ticker quotation service.

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Q. In what way was the action of the New York Stock Exchange with respect to its member firms arbitrary?

A. In my opinion, it was arbitrary because, upon calling the New York Stock Exchange and asking them "Why?", they said, "We don't have to give you a reason."

Q. Isn't it true that you did confer with representatives of the New York Stock Exchange?

A. Yes, sir.

Q. Isn't it true that the New York Stock Exchange informed you that if you desired to do so and you produced references from individuals, people that you were doing business with, it might prove of some assistance?

A. That was done. The firm of Leon, Weil & Mahoney.

Q. That is a law firm, is it not?

A. Yes, a law firm, was in touch with, I believe, one of the officers of the Exchange.

Q. On how many occasions?

A. I do not recall, perhaps I do not know.

[fol. 180] Q. Do you not have the material here that shows that they saw them on one occasion and only on one occasion?

A. I have no material with respect to that. I think it was Mr. Leon of that firm advised me that he had showed to whomever he spoke with, these various and sundry letters of recommendation. I think there must have been a dozen of them.

Q. Were you present?

A. No, I was not present, sir.

Q. So all you know in that regard is what Mr. Leon told you?

A. Yes, what was reported to me, yes, sir. I was not present at the meeting or meetings. I believe my attorneys have copies of such letters, if you wish to see them.

Mr. MacKinnon: No, I don't want to see them at this time.

The Witness: Does that answer your question?

Mr. MacKinnon: Yes, it answers my question so far as Mr. Leon is concerned.

Q. I am asking you now, Mr. Silver, did you not discuss this question with representatives of the New York Stock Exchange and were you not told that you, if you desired to do so, you could assemble and produce whatever data you wanted with respect to the reputation, repute, standing and so forth of Municipal, the sole proprietorship, and Municipal, the corporation?

A. I was so advised and it was done so on my behalf by Mr. Leon of the law firm of Leon, Weil & Mahoney.

Q. Is that so?

A. That is true, yes, sir. I would be very happy to give you the letters.

* * * * *

Q. Did you think it was arbitrary for the New York Stock Exchange to require its members to discontinue wire service and ticker service with a sole proprietorship of an individual who had been denied security clearance? [fol. 181] A. I believe it was arbitrary on their part, yes, sir.

Q. Did you think it was arbitrary for the New York Stock Exchange to require its members to discontinue wire service to a corporation which was controlled by a husband and wife, both of whom had been denied security clearance by the United States Government?

A. I think it was arbitrary, sir.

Q. You also say that the discontinuance of such service and the Stock Exchange's participation in it was malicious. In what manner was it malicious?

A. I think the mere doing of it was malicious.

Q. The act alone without more?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Will you read paragraph Thirty-sixth, please?

A. I have read it (referring to document).

Q. Are you able to state what agreements the New York Stock Exchange induced any of its member firms to violate so far as the sole proprietorship is concerned? We will take that first.

A. I think we have covered this before but I will—

Q. You need not repeat it if it is your position that your prior testimony applies.

A. I believe my prior testimony applies.

Q. Don't believe so, state so.

A. My prior testimony applies.

Q. Is the same true with respect to Municipal, the corporation?

A. Yes, sir.

Q. You also state in paragraph Thirty-sixth that "the plaintiffs have sustained great loss and damage."

This is something that has already happened, as I read your allegation of the complaint; is that correct?

A. Some damage has occurred, yes, sir.

Q. I want you to tell me what damage occurred. What loss or damage occurred to Municipal, the sole proprietor- [fol. 182] ship, first.

A. We found it necessary to close our branch offices because our employees did not continue completely with us in view of the fact that the Stock Exchange had ordered the removal of the wires and other services that we had.

Q. In other words, loss of employees?

A. Loss of employees, loss of volume of business went down as a result of that.

Q. What volume of business was lost? Can you give me any fact with respect to the loss of a penny's worth of business?

A. I don't have my books here from which to determine it.

Q. Can you determine it from your books?

A. We could try.

Q. Will you try and if you are able to determine it, produce it to me through your attorney?

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Q. With respect to Municipal, the corporation, what loss or damage was suffered by it?

A. The same type of loss or damage which was suffered by Municipal, the proprietorship, and which subsequently led to the complete shut-down of the operation and the further fact that no business is presently being done by the corporation.

Q. I am only asking about the period embraced in the complaint. As I read paragraph Thirty-sixth, that refers to a definite loss and damage at the time the complaint was drawn.

A. At the time the complaint was drawn, the office was not completely shut down and, therefore, that part of it perhaps would not apply to the answer of your question. So we can perhaps eliminate that. That would apply to further damage.

Q. Will you produce to your counsel for production to me whatever evidence you have of such loss and damage as far as Municipal, the corporation, is concerned?

A. We will attempt to gather it and produce it.

[fol. 183] Q. Since the date of the discontinuance of wire service with the member firms named in the complaint, has Municipal, the corporation, accepted any orders for listed securities?

A. Without reference to the records it would be difficult to answer the question with absolute accuracy. However, I believe that they probably have.

Q. Do you know with what member firms such business was placed?

A. I would not know without further reference to the records.

Q. Will you ascertain that fact and furnish it to me, please, through your counsel?

A. Yes, sir.

Q. Has Municipal, the sole proprietorship, since the date of the discontinuance of the private wires with the member

firms of the New York Stock Exchange and the ticker quotation with Municipal, the corporation, placed any orders for listed securities?

A. Without a complete check I could not accurately answer it, but I believe that they have not.

Q. Will you ascertain that fact and furnish me with that information through your counsel?

A. Yes, sir.

Q. Will you turn to paragraph Forty-first of your complaint and read it, please?

A. Yes (referring to document). I have read same.

Q. To what wrongful acts do you refer in paragraph Forty-first on behalf of the New York Stock Exchange?

A. The fact that they were instrumental in the discontinuance of the private wires between the member firms and ourselves; the discontinuance of the teletype between Straus, Blosser & McDowell and ourselves and the discontinuance of the ticker quotation service that was being furnished us.

Q. Your statement with respect to such wrongful acts applies to both Municipal, the sole proprietorship, and Municipal, the corporation?

A. Yes, as the services affected each one.

[fol. 184] Q. The quotations service, the ticker service, was a service that was rendered to Municipal, the corporation?

A. That is correct.

Q. So that the discontinuance of that had nothing to do with Municipal, the sole proprietorship, had it?

A. No, the ticker quotation service, as such, had nothing to do with the proprietorship.

Q. And the discontinuance of the private wire service to all except Dallas Union, Merrill Lynch and Straus, Blosser had nothing to do with Municipal, the sole proprietorship?

A. That is not necessarily true.

Q. Nothing is necessarily true in any case, so let's confine ourselves to this situation.

The Witness: Strike "That is not necessarily true."

A. I can answer you best by stating that the proprietorship had lines to these three members herein referred to whereas the corporation had these private lines to many additional firms. The offices of the corporation and the proprietorship were located, at the time of the discontinuance, in the same office area and if it was necessary for an employee of the proprietorship to communicate with one of the firms who was available through the corporation's wire, they would not hesitate to do so. It was still a much more convenient device, much faster and much better from their viewpoint to use if it would serve their purpose.

Q. In other words, if they desired to use it, it was there; is that it? The private wires were there if they desired to use them?

A. Yes, sir.

Q. When the private wires were removed, you were still able to reach, or the sole proprietorship was still able to reach whatever brokerage houses it wanted to reach on other telephone service?

A. Regular telephone service was still available to both [fol. 185] the corporation and the proprietorship.

Q. You say in paragraph Forty-first that defendant "seriously impaired the vested property rights of the plaintiffs." What property rights of the plaintiffs were impaired?

A. The right to do business.

Q. How was the right to do business impaired? Municipal, the sole proprietorship, is still doing business, is it not?

A. Not as well as it was doing it before and, therefore, it is impaired.

Q. Is that what you meant by that allegation of your pleading?

A. Perhaps I can further expand by saying that it refers to our right to do business as other people do business and the right to do business as we were doing it prior to the action of the New York Stock Exchange.

Q. Is that true also with respect to Municipal, the corporation?

A. Yes, sir.

Q. There are plenty of people, are there not, that are doing business without the wire service of member firms of the New York Stock Exchange?

A. They are not doing it as well as we were doing it with the wire service.

Q. In other words, you say the impairment was the manner that you did business; is that correct? The manner in which you did business?

A. I might go further and say the fact that other firms are not doing it doesn't mean that they should not perhaps do it. If they are not aware of what they should do in their business, I cannot be held responsible for what they are doing.

Q. Mr. Silver, I don't think you are asked to be responsible for what other people are doing. You have a right to do your business the way you want to do it. Somebody else has the right to do their business in the way they want to. I am dealing with you. I am trying to find out what vested property right of Municipal, the sole proprietorship, and Municipal, the corporation, was impaired.

[fol. 186] A. The very right that you refer to in your previous statement, *the right to do business as I would do it as against the right of somebody else to do business the way they want to do it.*

Q. Is it your position that Municipal, the sole proprietorship, and Municipal, the corporation, had a vested right to have wire connections with member firms of the New York Stock Exchange?

A. It is my position that the proprietorship and the corporation had a right not to have these connections interfered with. I am at a loss to further clarify it now, sir.

Q. Let me ask you the question: at the time you made application, you knew and when I say "you" I am talking about Municipal, the sole proprietorship, and Municipal, the corporation, knew that they were being given temporary approval pending an investigation, did they not?

A. Based on the paper you showed me sometime ago, it appears that was the agreement that they signed.

Q. There wasn't any doubt about it, was there?

Mr. Dickstein: The agreement speaks for itself, Mr. MacKinnon.

A. I don't deny the existence of the agreement. Leave out the word "appears", I am sorry, sir.

Mr. MacKinnon: Read the last question and answer, please.

(The record was read.)

Q. Can you now state any further than you have what vested property right defendant, the New York Stock Exchange, impaired?

A. I cannot state any further.

[fol. 187] Q. What irreparable harm did the discontinuance of such wire service occasion to the sole proprietorship and to the corporation?

A. The business of both the proprietorship and the corporation which was lost cannot be replaced, and that harm is irreparable.

Q. You are going to furnish me, through your counsel, with evidence of whatever business that was to the sole proprietorship and to the corporation; is that right?

A. We will attempt to furnish you, but it is difficult to know what business you didn't get because of a certain event. We will try to.

Q. That is what you did do. My question is how did the New York Stock Exchange interfere with the lawful conduct of Municipal, the sole proprietorship, and Municipal, the corporation's business?

A. With reference to the proprietorship, the discontinuance of the wires prevented it from doing its normal business in municipal securities. With reference to the corporation, in addition to not being able to do the listed business as an accommodation for its customers, it was unable to do its over-the-counter business, which probably was substantially greater than the amount of listed business it did. It was the over-the-counter business on which the proprietorship made profits.

Q. It was the only business on which it made profit, was it not?

A. The corporation?

Q. Yes.

A. The corporation made money on over-the-counter business, made money in connection with its underwritings. I would say that was substantially the major source of its income.

Q. It made no money out of any listed securities, did it, out of the purchase and sale of listed securities for customers?

The Witness: Read the question, please.

(The question was read.)

[fol. 188] A. No, sir, it made no money definitely out of such.

Q. Do you want to elaborate something more?

A. No, I have nothing to elaborate.

Mr. MacKinnon: Aside from that, the examination of Mr. Silver is closed and we will go on tomorrow morning with Mr. Coleman and I will communicate with you during the day as to where we will do it.

Mr. Dickstein: All right.

[fol. 189]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM DEPOSITION OF WALTER COLEMAN

WALTER COLEMAN, called as a witness by plaintiffs, having been first duly sworn by the Notary Public and stating his residence at 154-04 Beech Avenue, Flushing, New York, testified as follows:

Examination.

By Mr. Dickstein:

Q. Will you state your name, please?

A. Walter Coleman.

Q. You are connected with the New York Stock Exchange, Mr. Coleman?

A. Yes, sir.

Q. In what capacity?

A. Assistant director, Department of Member Firms.

Q. How long have you held that position?

A. Approximately five years.

Q. Were you with the Exchange prior to that time?

A. Yes, sir.

Q. In what capacity?

A. Various capacities, manager of division, and subordinate capacities for many years.

Q. Manager of what division?

A. I was manager of the Division of Member Officers and Personnel, I was manager of the Division of Commissions and Quotations.

Q. How long in all have you been affiliated with the New York Stock Exchange?

A. Since February 1921.

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Q. Are you aware of Exchange policies, Mr. Coleman?

A. Yes.

Q. Are you aware of Exchange policies with respect to Exchange administration and control of its stock quotation services?

A. Yes, sir.

Q. Do you know why the Stock Exchange determines whether a particular individual or firm may have stock quotation service?

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A. Yes, sir.

Q. Why?

A. I mentioned before that the Exchange is a quasi-public institution. The Exchange feels that it has a definite [fol. 190] responsibility to protect the public interest, and in order to do that it feels that it should make every effort to prevent any of its facilities from falling into the hands of anyone who either might abuse those privileges or who might, for reasons of reputation or possibly other reasons, might affect the public interest adversely. We set for our

own members a very high standard of ethics and performance. We feel that we shouldn't have two standards if any non-members are going to enjoy our facilities, they should be subject to the same standards.

Q. Do you know what dangers to the public interest the Exchange attempts to avoid by precluding persons of bad reputation from having its stock quotation service?

A. Yes.

Q. What are those dangers?

A. I know some of them.

Q. Just your own knowledge, Mr. Coleman.

A. The operation of bucket shops, boiler shops, to use the vernacular.

Q. What is a boiler shop as distinguished from a bucket shop?

A. A bucket shop is an organization or an individual which consistently takes the other side of the market from the customer, who accepts customer's orders and, as a general rule, never executes the orders, but just gambles on the fact that the customer is wrong.

Q. And a boiler shop?

A. My answer in all of these is within the limits of my own understanding.

Q. What is a boiler shop?

A. A boiler shop is usually a physically small operation which employs high pressure telephone salesmanship to oversell to the public by quantity, and in many cases by quality.

Q. And what other types of dangers does the Exchange seek to avoid?

A. The danger of a non-member organization, or a member organization not having sufficient capital to protect the customer's property rights and privileges in connection with transactions he might make.

Q. Any others to your knowledge?

A. Anyone who might misrepresent any material facts or withhold any material facts from a customer.

Q. Material facts with respect to what?

A. With respect to securities, with respect to the standing of the firm or organization, with respect to applicable laws or statutes or registrations or filings, or any other misrepresentations.

Q. Have you covered reputation?

A. I have covered reputation in general, but I would certainly extend the reputation to mean again people of good repute.

Q. You would agree with Mr. MacKinnon that the Exchange would not install a ticker in a bawdy house?

A. I certainly agree, nor would we give it to anyone with a criminal record.

Q. When you say anyone with a criminal record, do you mean anyone who has ever been convicted of any criminal offense whatsoever?

A. I am not a lawyer. You would have to define criminal offense to me.

Q. We will take it in series. Would you preclude anyone who had ever been convicted of a felony from having quotation service?

A. It would depend on what the felony involved.

Q. What type of felony would preclude an individual from subscribing to a quotation service?

A. I don't think I can think of all the possibilities, but let me name you a couple. Manslaughter with a vehicle, possibly a technical Sullivan Law violation which might or might not be felonious. I don't know. Again, I am not a lawyer.

Q. Are you defining felonies which might not preclude?

A. Which might not preclude. A felony which would, in my opinion, preclude, would be any felony involving fraud, [fol. 192] deceit, fraudulent conversion, using the mails to defraud, violation of any of the Federal or State statutes regarding securities transactions.

Q. Would you say generally that the type of crime which would result in the preclusion of wire service would be a crime relating to the securities business in the first instance, and business honesty and equity principles of trade in the second?

A. Yes, but not necessarily in that order.

Q. But these two areas would fairly embrace the type of crime to which you had reference?

A. It would not necessarily completely embrace it, no.

Q. What other types of crimes might there be that fall outside of these areas?

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A. Conceivably one of the crimes—I don't know how much of a crime it is—Mr. MacKinnon referred to it previously.

Q. What crime—maintaining a bawdy house?

A. Maintaining a bawdy house.

Q. Would the Exchange also preclude wire service to someone who had been found guilty of a misdemeanor, in the areas that we have been discussing?

A. I could not answer the question.

Q. It would depend on a case to case basis?

A. It would depend on all of the circumstances.

Q. Would one of the factors considered be how long it has been since the commission of the offense?

A. It could be one of the factors, coupled with what the record had been since then.

Q. What you have been saying, Mr. Coleman, has been specifically directed to my question with respect to the purposes of the Exchange's control over ticker service. Is precisely the same thing true with respect to the Exchange's control over wire connections between members and non-members?

A. Yes, sir.

[fol. 193] Q. In implementing these rules, is the Exchange concerned only with improper securities transactions in securities listed on the Exchange?

A. No, sir.

Q. It would then be true that it is concerned with operations in any type of security?

A. Yes, sir.

Q. What does the Exchange do, and more specifically, what does your department do when information comes to its attention that one of its member firms has made a private wire connection with a non-member, without first securing Exchange approval?

A. The first thing we would do would be to check the

information to see if it were accurate. If it were, we would ask for an explanation.

Q. With whom would you check?

A. The member firm.

Q. And what would happen after you got the explanation?

A. It would depend on what the explanation was.

Q. Assuming that the explanation was not satisfactory, what would be the next step in your procedure?

A. Again, depending on the matter of degree of what was wrong, or how badly wrong, or how poorly they had explained, or how inadequately they had explained, the Exchange might involve any disciplinary action, or none. If the wire were to be continued, we would ask for a formal application.

Q. Who, under the Exchange's constitution and rules, has the responsibility of notifying your Department of such a connection—the member firm or the non-member firm?

• • • • •
A. The member firm.

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Q. What does the Exchange do when a member firm fails to discontinue a non-approved or a disapproved private wire connection with a non-member after being notified that it should so discontinue?

A. I could not answer that, because I don't know of any such case.

[fol. 194] Q. It has never happened in the time in which you have been connected with the Exchange?

A. Not within the limits of my recollection.

Q. And how far would your recollection go back in this respect?

A. Seven or eight years.

Q. Have there been other cases in which the Exchange has advised its member firms to discontinue private wire connections with non-members, other than the one which is the subject of this litigation.

A. Yes.

Q. Could you estimate about how many such cases you have a year?

A. No, because it would vary from year to year. You might not have any, and you might have six or eight in a year.

Q. How many have there been in the last five years in which you have been in your present position?

A. I could not answer that without referring to records.

Q. Would you say there have been more or less than one hundred?

A. If you want an opinion, I will say there have been far less than one hundred.

Q. Would you say there have been less than fifty?

A. I would not be nearly as sure of that.

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Q. If the Securities and Exchange Commission revokes a broker-dealer registration, does the Exchange automatically order discontinuance of private wire connections with that broker-dealer?

A. Not automatically, no.

Q. What does it do in addition to obtaining information that the broker-dealer registration has been revoked?

A. Try to find out what the revocation was based upon, whether it actually put the people out of business, whether they could still continue in some phase of business. Not all broker-dealers, you know, are subject to the SEC.

Q. Yes, I do know that. Under what circumstances might the SEC revoke a broker-dealer registration, but the Exchange nevertheless permits the continuance of private [fol. 195] wire connection with that particular firm or individual?

A. I can't think of any at the moment.

Q. Has it ever happened within your administration of this program?

A. Not that I recall.

Q. If a non-member firm or individual who is also a member of the National Association of Securities Dealers was expelled from that Association, would the Exchange automatically withdraw permission for private wire connections with that firm or individual?

A. Not automatically.

Q. Under what circumstances might it not withdraw following that action?

A. Under the circumstances that after getting all of the information that was available, considering it carefully, we would come to the conclusion that withdrawal of wire or ticker facilities wasn't warranted.

Q. Would it be correct to say, then, that regardless of the action taken by the Securities and Exchange Commission, or any other exchange or any other association of securities dealers, the Exchange in all instances will make its independent determination as to what action it deems appropriate?

A. Yes.

Q. Does the Exchange make any distinction between private wire connections by telephone, and private wire connections by teletype, telemeter, or other electronic means?

A. No, sir.

Q. Could you give me a complete, or as complete as you can make it, list of those means of communication which are covered under the Exchange's wire connection rules?

A. The rules themselves spell out several, and they also state, "or any other means of communication." The ones that would come to mind, the obvious ones, would be a private telephone wire, telemeter. I even know of two Morse wires that are still in use. Telegraph in any form.

Q. Do you mean private telegraph?

A. Yes.

Q. You would not mean a telegram sent over regular Western Union facilities from a member or non-member?

A. That would not be a private wire communication, or a comparable private means of communication.

[fol. 196] Q. Is an investigation conducted in every case where an application has been made for private wire connection with a non-member firm?

A. No, sir.

Q. Is an investigation conducted in every case in which a non-member, or non-member firm, makes application for stock ticker service?

A. No, sir.

Q. How do you determine in the first instance whether you will or will not make an investigation?

A. If the applicant already has ticker service, already has private wire service and is merely applying for additional ones, we would not make an investigation.

Q. But if there is no prior current service, such an investigation would be conducted as a matter of course?

A. Yes, sir.

Q. How does the Exchange initiate its investigative procedures?

A. I don't think I understand the question.

Q. What is the first thing they do when they decide that a particular case must be the subject of an investigation?

A. They examine the information that has been supplied by the candidate for the service. They check any files or records of our own, and then communicate either directly or through commercial agencies with past employers, business associates. We would normally also, and always in the case of a securities firm, would check with the SEC, with the Blue Sky Commission or its counterpart in any States where they operate or have operated.

Q. As part of the preliminary investigation, and if you would, please accept my terminology—we will call everything you said up to this point a preliminary investigation—does the Exchange conduct directly or through a representative, a private investigation agency, a field investigation?

A. Yes.

Q. By field investigation, Mr. Coleman, I mean actually having an investigation or going into the field to speak to [fol. 197] people, whether they are former employers, neighbors, business associates, or what have you.

A. It is a customary procedure. It is not in any case an absolute procedure.

Q. How do you determine whether you shall use that procedure and when you shall not?

A. Whenever in our opinion it is necessary to use outside agencies for any coverage that we feel for practical

reasons we can't do as quickly, as inexpensively, or possibly at all, we use outside agencies. Again, that is purely a matter of expediency for ourselves.

Q. If the investigation procedures that you have been describing develop derogatory information with respect to the applicant's background, does the Exchange institute any further check?

A. Sometimes.

Q. And what would be the nature of that further check?

A. It would depend on what the circumstances were, and what we were trying to check, the nature of the information, and how well we thought we could check it.

Q. Does the Exchange make any independent effort to determine the reliability of the derogatory information that is received?

A. Quite possibly, yes.

Q. Does it normally?

A. Normally we try to verify everything we get.

Q. I take it then that the Exchange does not necessarily accept the truth or accuracy of derogatory information revealed in its investigative procedures?

A. Not necessarily, but it does accept in good faith information which comes to it from what it considers to be reliable sources.

Q. Is there any particular reason why the Exchange's operations with respect to private wire operations fall within this division?

[fol. 198] A. The answer to that lies within the name of the division. It is the Division of Commissions and Quotations. Quotations refer to stock quotations for transactions on the New York Stock Exchange, or bond transactions, and they are published on the tape over our ticker system.

Q. But we are now talking about private wire connections.

A. Private wires, merely because it is a means of communication, and has been for years within the bailiwick of that particular division or its predecessor.

Q. Because it is considered an extension of the quotation lines on the Stock Exchange?

A. Yes, sir, because in a great many cases private wires are used for the getting of quotations, as well as for the obtaining of orders.

Q. And by this I take it you mean quotations on securities listed on the New York Stock Exchange?

A. Yes.

Q. Does the Exchange, and particularly your Department, in any way consider the type of transactions or communications that are made over these private wires of wire connections, with respect to whether or not it will grant or deny approval of such connections?

A. To the extent that they must be all proper legal transactions, yes. As distinguished between whether they be listed or unlisted stocks or bonds or high priced or low priced securities, no.

Q. Would it be correct to say, then, that the Exchange's determination as to whether a particular connection would exist, would in no way be governed, or in no way be affected by whether or not quotations on securities listed on the New York Stock Exchange are transmitted over these wires?

A. That is correct.

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Q. Mr. Coleman, is there not a long standing Exchange policy against revealing the reasons for the denial or disapproval of wire connections in any particular case?

Mr. MacKinnon: Revealing to whom?

[fol. 199] Mr. Dickstein: Revealing to the subject, the applicant.

The Witness: Yes, sir.

Q. What is the reason for that policy, if you know?

A. Protection of sources of information would be one reason.

Q. Would there be any other reason?

A. I am sure there could be. I can't think of any at the moment.

Q. Would it be correct to say that in instances where the information is of a public nature, and the source does not require protection, the Exchange policy against reveal-

ing the derogatory information to the applicant is departed from?

A. If so, it would be very rarely.

Q. Are the Exchange's reasons for disapproval or withdrawal action ever communicated to members or member firms?

A. I don't recall of any cases.

Q. In which such communication has been made?

A. Unless, again, it were something based on a matter of public record.

Q. Is the Exchange concerned with allegations of bad morals or immorality which have no connection with securities transactions or the securities business itself?

A. I would have to answer that the same way I answered the previous question.

Q. How would you answer that?

A. In considering any application or any situation the Exchange is interested in all of the information, good, bad or indifferent. The Exchange may, after developing information, elect to use or not use any part of it. The Exchange would be, I think, more keenly interested in anything bearing upon integrity.

Q. Why integrity specifically?

A. Because again our primary objective is to protect the public interest.

Q. In securities transactions?

A. In transactions of any kind with people who are members [fol. 200] or who are enjoying any of the privileges of membership, or any of the facilities of the Exchange.

Q. By privileges of membership, or facilities of the Exchange, you mean to include private wire connections between members and non-members?

A. I mean to include the people who were on the other end of the wire, yes.

Q. When you say facilities, do you mean to include the private wire connection between a member and a non-member—the connection itself?

A. Yes.

Q. In determining whether or not a particular applicant will be approved for either private wire connections or

stock ticker service, does the Exchange concern itself solely with its belief or impression as to how that individual or firm making application will behave with respect to securities transactions?

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Q. I will add to that question, such belief or impression being formulated on the basis of the prior history, background, etcetera, as revealed by the investigation process.

A. I don't think I can answer it categorically. Certainly in formulating its decision, the Exchange would take into consideration the past background and past performance of any candidate for facilities. I think depending then upon the circumstances, what that background was the individuals, and everything else that the Exchange had developed about those individuals, good, bad and indifferent, the Exchange would come to a decision.

Q. But would that decision focus upon the answer in your own mind to the question, how will this individual or firm behave with respect to securities transactions?

A. Not entirely. To some extent I am sure it would, but there is also the broader aspect. I mentioned several times the Exchange is very proud of its reputation, is very proud of the part it plays in the world economy and the part it plays in protecting the interests of the investing public. It doesn't want to jeopardize that position or that reputation, [fol. 201] so I think that is another one of the factors that would enter into any consideration.

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Q. In this particular case, and I am speaking of the withdrawal of approval of private wire connections and stock ticker service furnished to Municipal Securities Company, a proprietorship, and Municipal Securities Company, Inc., a corporation—was the subject of the investigation ever called upon to make or give any explanation of any derogatory information prior to the withdrawal of approval of the connections?

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Q. By the Exchange.

A. Not to the best of my recollection. This happened

sometime ago, and a lot of applications passed over my desk.

Q. Would an examination of your file reveal whether or not any letter or telegram had ever been sent to the subjects of the investigation prior to the withdrawal action, with respect to or in request of an explanation of derogatory information?

A. It should show.

Q. Can you examine your file and ascertain?

Mr. MacKinnon: Any file of the character you are speaking about has been submitted to you for discovery and inspection. The only thing that has been withheld are the reports that Judge Bicks stated would be available to you on certain specified conditions.

Q. Did you, Mr. Coleman, personally ever ask the subject or subjects of this investigation for an explanation of the derogatory information turned up by your investigation?

A. To the best of my recollection, I never asked any of the principals specifically or directly for an explanation. Mr. Silver came in to see me on one occasion after this action, and I invited him at that time to tell me anything at [fol. 202] all he felt free to tell me, or felt might help us to have a better picture of the situation.

Q. Did Mr. Silver make a request that he be furnished with the reasons or basis for the Exchange's action?

A. Yes, he did to me.

Q. And was that request declined?

A. It was declined. This was an oral request.

Q. During his conference with you?

A. Yes.

Q. Do you recall the date on which that conference took place?

A. No, I don't recall the date. The file would show it. Again, I see many people during the day. There have been a lot of days that elapsed since then.

Q. Do you recall whether that conference was subsequent to the withdrawal action?

A. It is my belief that it was subsequent to our withdrawal of approval.

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Q. Is it your custom to make such report to the SEC when this type of action has been taken?

A. It is our custom to report disciplinary actions of all sorts to the SEC.

Q. And do you know specifically whether this action was reported?

A. No, I don't, sir.

Q. Would you characterize this as disciplinary action?

A. In a very broad sense, yes, within the meaning of my previous characterization.

Q. Is this type of action a disapproval of private wire connection to a non-member firm, or a withdrawal or disapproval of stock ticker service to a non-member firm, normally communicated to the Securities and Exchange Commission by the Exchange?

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A. As a normal procedure, as I mentioned before, we report to the SEC any actions which are of a disciplinary nature, or anything comparable to a disciplinary nature.

[fol. 203] Q. Including this type of action?

A. Including this type.

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Q. When you customarily notified the Securities and Exchange Commission of disciplinary proceedings which have been taken, do you also advise the Commission of the reasons why you took such action?

A. On occasion.

Q. This is not the rule?

A. May I again qualify the answer? It is our custom to advise the SEC formally of every disciplinary action taken against a member firm, an allied member, or in some cases, employees of member firms—certain classes of employees, not all. That is done formally. It is our custom normally to inform the SEC informally of other proceedings or procedures or actions we have taken, of types which would include this type of action, not limited to this type.

Q. And in communications to the SEC of actions of this type, would you normally give the SEC the reasons why you have done what you have done?

A. Not unless they asked for it.

Q. Which SEC office is advised when you do advise the Securities and Exchange Commission of action taken?

A. As a matter of normal practice, it would be the New York office. As a matter of occasional convenience, if we happen to be talking to someone in the Washington office, and we are in frequent communication with them in either direction, it is quite possible that we might pass it to them, because eventually all the information goes to them from the regional offices.

Q. You will either notify New York or Washington?

A. As a general rule.

Q. As a rule it will be New York?

A. Yes. Washington may call us later and say, "What is it all about?" It is possible also—I don't recall in this specific case—but it is possible that the Securities Commission of any State, the Blue Sky Commission, might ask us formally or informally if we had taken such an action, because they may have heard of it in some other way.

Q. If such an inquiry is made by a State commission, do you furnish the State commission with the reasons for the action taken?

A. Not normally.

Q. If they request the reasons do you furnish it to them?

A. It would depend on what the reasons were.

Q. There are certain reasons which you would not reveal to a State commission?

A. I am sure there are. At the moment I could not distinguish between which we would and which we would not.

Q. Are there certain reasons which you would not reveal to the Securities and Exchange Commission?

A. I can't think of any.

Q. As between yourselves and the Securities and Exchange Commission there would tend to be full disclosure if disclosure were requested?

A. Yes. We are under the direct supervision of the Securities and Exchange Commission, as an exchange. We are not under the State supervision as an exchange as such.

Q. Do you make full disclosure to other exchanges requesting information of this character?

A. When you say full disclosure, you mean all?

Q. Including all the reasons, if they ask for it.

A. Again, it would depend on the reasons.

Q. Do you advise other exchanges of the fact that you have taken such action, if they make an inquiry?

A. If they make an inquiry we might. We would not do it gratuitously.

Q. You do not, I take it, disseminate in any broad form this information to anyone?

A. No. Only the people who we think are required to know about it.

Q. Do you disseminate it to member firms other than those who have pending or granted applications for private wire connections?

A. Not per se. It is possible some firm might come in with an application or call us and say, I want to put in an [fol. 205] application. Can I put in a wire. It is quite possible, and we would say no.

Q. But there is no list of firms with whom member firms are not permitted to have private wire connections?

A. Good heavens, no.

Q. Do you maintain such a list in your own office—in your own Department?

A. We do not, nor to the best of my knowledge, do we maintain one in any department of the Exchange.

Q. Mr. Coleman, I ask you once more to look at Rule 358, paragraph 2358.13 of the Rules of the New York Stock Exchange. The record should show when I refer to paragraph numbers, I am referring to paragraph numbers in the C. C. H. Edition of the Exchange's Constitution and Rules.

A. All right, sir.

Q. Mr. Coleman, perhaps we should get a fresh start on this. Are you saying that this rule applies to any means of communication whatsoever, whether private or public?

Q. In your opinion.

A. In my opinion, the answer is yes. With respect to business, and I quote the language, "... any business, directly or indirectly with or for any illicit or illegal organization, to any organization, firm or individual making a practice of dealing on differences in market quotations, or, 3, any organization, firm or individual engaged in purchasing or selling securities for customers and making a practice of taking the side of the market opposite the side taken by the customers."

Q. What is meant by the word "business"—business transmitted—in your opinion?

A. I don't think I can define it any better than Mr. Webster or Funk & Wagnall define it.

Q. What kind of business are you thinking of?

Mr. MacKinnon: Anything the Stock Exchange can possibly do.

[fol. 206] Q. I take it the rule would not prohibit a member firm from buying stationery from an organization, firm or individual which makes a practice of dealing on differences in market quotations?

Mr. MacKinnon: You know the only thing it relates to is a regulation of a market for securities. That is the only purpose of the Stock Exchange, so let's not be preposterous about it.

Q. Do you adopt Mr. MacKinnon's answer?

A. I adopt it with some additions. I can conceive also if you were doing an illegal gambling business over the wire, we would certainly object to it.

Q. Any illegal gambling business relating to quotations on the New York Stock Exchange?

A. Relating to anything. Primarily Mr. MacKinnon's idea covers it.

Q. Would the business referred to in the rule, in your opinion, relate also to transactions in securities which are not listed on the New York Stock Exchange?

A. I think the answer would be yes.

Q. It would apply to transactions in securities even though those securities are not listed on the New York Stock Exchange?

A. The member is still a member.

.

Q. Mr. Coleman, would you advise me when you received a report in response to the Exchange's request for further investigation?

A. We received several under different dates. I couldn't tell you the receipt date, but I can tell you the dates of the reports. One was April 14th; one was April 22nd; and one was May 1st. There may have been two on May 1st—in 1959, of course, all of these dates.

Q. Did these reports confirm the derogatory information previously given to you?

A. In my opinion they did, sir.

Q. Was there any portion of the derogatory information which had been previously given to you that was refuted by these reports?

A. None.

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[fol. 207]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM THE N. Y. S. E. CONSTITUTION AND RULES

[The following material is taken from the 1959 C. C. H. edition of the New York Stock Exchange Constitution and Rules. The numbers in parentheses refer to the pages of that edition.]

CONSTITUTION:

Article III, Sec. 6 (1056):

"The Board of Governors . . . shall have supervision over all matters relating to the collection, dissemination and use of quotations and of reports of prices on the Exchange and Shall have power to approve or disapprove any application for ticker service

to any non-member, or for wire, wireless, or other connection between any office of any member of the Exchange, member firm or member corporation and any non-member, and may require the discontinuance of any such service or connection."

Article XIV, Sec. 6 (1087):

"A member or allied member who shall be adjudged guilty, by the affirmative vote of a majority of the Governors then in office, of a violation of the Constitution of the Exchange or of a violation of a rule adopted pursuant to the Constitution or of a violation of a resolution of the Board of Governors regulating the conduct or business of members or allied members or of conduct or proceeding inconsistent with just and equitable principles of trade may be suspended or [fol. 208] expelled as the Board may determine."

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Article XIV, Sec. 10 (1088):

"A member or allied member who shall be adjudged guilty, by the affirmative vote of a majority of the Governors then in office, of any act which may be determined by the Board of Governors to be detrimental to the interest or welfare of the Exchange may be suspended for a period not exceeding five years."

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Article XIV, Sec. 14 (1089-1090):

"An accusation, charging a member or an allied member before the Board of Governors with having committed an offense, shall be in writing; it shall specify the charge or charges against such member or allied member with reasonable detail, and shall be signed by the person or persons making the charge or charges. A copy of such charge or charges shall be served upon the accused member or allied member either personally, or by leaving the same at his office address during business hours, or by mailing it to

him at his place of residence. He shall have ten days from the date of such service to answer the same, or such further time as the Board may deem proper. The answer shall be in writing, signed by the accused member or allied member, and filed with the Secretary of the Exchange. Upon the answer being filed, or if the accused shall refuse or neglect to make answer as hereinbefore required, the Board shall, at a regular or special meeting thereafter, proceed to consider the charge or charges; if such meeting be a special meeting, [fol. 209] notice of the object thereof shall be sent to all Governors. Notice of such meeting shall be sent to the accused; he shall be entitled to be personally present thereat, and shall be permitted in person to examine and cross-examine all the witnesses produced before the Board and also to present such testimony, defense or explanation as he may deem proper. After hearing all the witnesses and the accused, if he desires to be heard, the Board shall determine whether the accused is guilty of the offense or offenses charged. If it determines that the accused is guilty, the Board may fix and impose the penalty and a written notice of the result shall be served upon said member or allied member in the manner hereinbefore provided. The findings of the Board shall be final and conclusive."

RULES

Rule 355 (3611):

"(a) No member or member organization shall establish or maintain any wire connection, private radio, television or wireless system between his or its offices and the office of any non-member, or permit any private radio or television system between his or its offices, without prior consent of the Exchange.

(b) Every non-member will be required to execute a private wire contract in form prescribed by the [fol. 210] Exchange to be filed with it, unless a contract is already on file with the Exchange.

(c) Notification regarding a private means of communication with a non-member and the signed contract when necessary shall be submitted to the Department of Member Firms. This notification, by a member or allied member, may be in form supplied by the Exchange or in letter form, and shall include the essential facts concerning the non-member and the means of communication.

(d) Each member or member organization shall submit annually to the Department of Member Firms a list of all non-members with whom private means of communication are maintained.

(e) The Exchange may require at any time that any means of communication be discontinued."

• • • • •
Rule 356 (3611):

"The Exchange may require at any time the discontinuance of any means of communication whatsoever which has a terminus in the office of a member or member organization. * * *."

• • • • •
[Supplementary Material following Rules 355 to 358]:

Rule 358 [¶ 2358.10] (3612):

" * * * "

Where a non-member requests a member organization to obtain or transmit quotations or orders in unlisted securities between the non-member and other organizations over a wire paid for by the member [fol. 211] organization and the member organization, instead of effecting the transactions, gives up the name of the non-member who confirms directly with the other party, the member organizations must make a per share charge in connection with the transactions."

• • • • •

Rule 358 [¶ 2358.13] (3612):

"Prohibited wire connections.—No member, allied member or member organization may utilize any private or public wire connection or any other means of communication whatsoever to transmit any business directly or indirectly with or for:

(1) Any illiet or illegal organization;

(2) any organization, firm or individual making a practice of dealing on differences in market quotations; or

(3) any organization, firm or individual engaged in purchasing or selling securities for customers and making a practice of taking the side of the market opposite to the side taken by the customers."

[fol. 212]

EXCERPTS FROM ORAL ARGUMENT IN DISTRICT COURT

Mr. MacKinnon: Now let us deal with the next phase of this thing. They had two companies in Dallas: Municipal, Inc., the corporation, and Municipal, the sole proprietorship.

Without asking for the Stock Exchange to approve a wire connection Municipal, in 1956, tied up wires to certain member firms in Dallas. In 1958 they did us the courtesy, at least, of applying, and it was in 1958 that we gave the temporary approval.

So that from 1956 down to the date the wires were withdrawn there wasn't even any approval for the wires which Municipal had with member firms of the Exchange, and only the temporary approval with respect to Municipal, Inc.

These people went into the municipal bond business through the sole proprietorship and the over-the-counter securities business through the corporation.

• • • • •

The Court: • • • Now, before you get to the question of damages, as far as I can gather, the basis of the Stock Exchange's defense is that its action was reasonable.

Mr. MacKinnon: In large part.

The Court: Now, is there anything else relied on that you intend to present to the Court?

Mr. MacKinnon: I am certainly going to discuss it with you at the end of this argument.

The Court: Mr. MacKinnon, then, perhaps we had better wait until then, because I want to know exactly what I am going to have before me.

Mr. MacKinnon: Well, I have to discuss it with you.

The Court: All right.

• • • • •

[fol. 213] Mr. MacKinnon: I do just want to state this:

The investigation that we undertook here was not an investigation that was singular to Municipal and Municipal, Inc. This is an investigation that was undertaken with respect to people who applied for private wires, to people who applied for ticker service, so that we did not single them out.

Now, what did we do with respect to the conduct of the investigation? We turned to people who are in that field. This is their daily life. We turned to them and asked them to turn up the information that they have.

We have used them for many years. We believe they are reliable and we relied on them. We relied on them in the past. This was not something that was done by hit or miss. This is something that was done with seasoned deliberation in this case, as in all cases.

• • • • •

Mr. MacKinnon: I say, Your Honor, there is no such thing as my adversary says. He is not a member of the Exchange, and never was, and I say that the only test—the only test to be applied is: Did we act reasonably?

And I don't know how you can act reasonably if you don't entrust your reputation to people whom you believe to be competent, and if the Defense Department is not a reliable source of information for it, I don't know what could be.

The Court: All right. Now I am coming back to my question.

Mr. MacKinnon: Yes.

The Court: Can we start with what else do you plan to submit and under what circumstances?

Mr. MacKinnon: Well, the situation is such that I feel Your Honor would have to make the ground rules. However, I would like to do this, and I don't think that it is an unreasonable request. I would like to go back and discuss [fol. 214] it with my clients, because although I think that some of my papers in and of themselves, without more, do show the reasonableness of their investigation, yet—

The Court: I am not going to pass on that at this point.

Mr. MacKinnon: I know you are not going to but at the same time—

The Court: I will pass on it some time later.

Mr. MacKinnon: I know you are not going to pass on it at this point, but if Your Honor wants to make a direction of that here and now, that I am to submit it to my adversaries, I will be glad to submit it.

The Court: No. I will not do any such thing as that. I will say to you now that anything that you wish to submit to the Court under this motion will have to be submitted to your adversaries.

Mr. MacKinnon: No. I am positive of that.

The Court: That is as far as I will go.

Mr. MacKinnon: Well, will you let me have forty-eight hours on it?

The Court: Yes. I will let you have forty-eight hours on it.

Mr. Shapiro: No objection, Your Honor.

The Court: I take it that you people are going to be around, aren't you, here in New York?

Mr. MacKinnon: Mr. Shapiro goes back to Washington, I imagine.

Mr. Shapiro: I will be going back to Washington, but, of course, I believe that we can arrange it.

Mr. MacKinnon: Yes, we can arrange it.

The Court: All right.

Mr. MacKinnon: Now, they have submitted a brief and I am very frank to say that I have not had the time to go into it. I got that this morning, and I would like to have, if it is possible to do so, until Monday morning to reply to it.

[fol. 215] The Court: I will give you until Monday morning.

Mr. Shapiro: No objection, Your Honor.

Mr. MacKinnon: And the same if I want to put anything in in reply to the affidavit.

The Court: Yes.

The Court: All right, gentlemen, I will take it under advisement, and we will leave it this way for the time being: Mr. MacKinnon will have until next Monday to decide what further he is going to submit with the understanding that anything—that anything that he submits to me—

Mr. MacKinnon: That is right.

The Court: —goes plainly to the other side.

Mr. MacKinnon: Yes.

Mr. Shapiro: And may I have five days in which to reply with respect to that, Your Honor?

The Court: All right, but I don't want to be receiving too many replies.

Mr. Shapiro: I have already replied to some extent on it, Your Honor.

Mr. Dickstein: This would go to new material, Your Honor.

The Court: In connection with any new material he submits, you certainly will have the same opportunity to reply to it, and I will give you five days.

Mr. Shapiro: Thank you very much.

[fol. 216]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM DECISION OF DISTRICT COURT—May 19, 1961

Bryan, District Judge:

Plaintiffs Harold Silver, doing business as Municipal Securities Company, and Municipal Securities Company, Inc., have moved, upon the first claim stated in the com-

plaint, for partial summary judgment under Rule 56(c), F. R. C. P., for a permanent injunction under Section 16 of the Clayton Act and, in the alternative, for a preliminary injunction under Section 16 of the Clayton Act and Rule 65, F. R. C. P. These motions present complex and novel issues. My opinion on them has been in preparation for some time and will be filed shortly. However, in fairness to the litigants I am now issuing this memorandum of my decision.

The first claim stated in the complaint embraces two distinct and separate claims which must be dealt with separately. The first relates to the acts of the defendant Exchange in requiring its members to withdraw private wire and telemeter connections between them and the plaintiffs. The second relates to the acts of the defendant Exchange in refusing to continue to furnish to plaintiff Municipal Securities Company, Inc., its continuous stock quotation ticker service.

With respect to the claim relating to private wire and telemeter connections I hold that pursuant to Rule 56(c) plaintiffs are entitled to partial summary judgment against the defendant determining that defendant is liable to plaintiffs under Sections 4 and 16 of the Clayton Act and that plaintiffs are entitled to a permanent injunction enjoining defendant from requiring its members to discontinue private wire and telemeter connections with the plaintiffs and [fol. 217] from interfering with the establishment and maintenance of such connections.

With respect to the claim relating to the stock ticker service I hold that plaintiff Municipal Securities Company, Inc. is not entitled to partial summary judgment pursuant to Rule 56(c). However, I hold that such plaintiff has established its right to a preliminary injunction under Section 16 of the Clayton Act and Rule 65, F. R. C. P. restraining defendant, pending the final determination of this action, from refusing to make available to such plaintiff its continuous stock quotation ticker service.

Appropriate provision for the entry of orders implementing this decision will be made in the opinion to be filed which will also contain my findings and conclusions.

Frederick vP. Bryan, U. S. D. J.

Dated: New York, N. Y., May 19, 1961.

[fol. 218]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

OPINION—June 16, 1961

Bryan, District Judge:

Municipal Securities Company is a sole proprietorship owned by plaintiff Harold Silver, engaged in the securities business, almost entirely in municipal bond transactions. Plaintiff, Municipal Securities Company, Inc. is a corporation organized under the laws of the State of Texas, also [fol. 219] engaged in the securities business, principally in the over-the-counter securities market.

Defendant, New York Stock Exchange is a New York unincorporated association with an authorized membership of 1375. The Exchange provides facilities for its members and their firms to trade in corporate securities listed by it. While the actual trading takes place on the floor of the Exchange in New York, its members do business on a nationwide scale. It is the largest and most important of the national stock exchanges. The Exchange has its principal office and trading facilities at 11 Wall Street in the City of New York.

This suit arises out of the actions of the Exchange in directing a number of its member firms to discontinue private wire and telemeter connections with the plaintiffs and in refusing to continue to furnish plaintiff Municipal, Inc. with its continuous stock ticker quotation service.

The complaint states three separate claims. The first is laid under Sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26, and alleges in substance a conspiracy between the defendant Exchange and various of its member firms, named as co-conspirators but not as parties, to deprive the plaintiffs of their private wire and telemeter connections with such member firms and of the stock ticker service, all to plaintiffs' substantial competitive disadvantage and in violation of the Sherman Act, 15 U. S. C. § 1, et seq.

The second and third claims sound in tort and allege that the Exchange tortiously induced its members to breach

contracts for wire connections with plaintiffs and caused plaintiffs intentional and wrongful harm without reasonable cause.

We are concerned here only with the first claim under the anti-trust laws. Plaintiffs have moved for partial summary judgment on the first claim under Rule 56(a) and (c), F. R. C. P., and for such further relief as may be appropriate. Plaintiff Municipal has also moved for preliminary injunctive relief under Section 16 of the Clayton Act.

[fol. 220] The motions are before me on voluminous affidavits submitted by both sides and a volume of supplementary material.

Jurisdiction over the first claim is based on 15 U. S. C. § 15.

On May 19, 1961 I filed a memorandum stating without opinion my holdings on these motions. This is my opinion.

FACTS.

There is no genuine dispute as to the following facts.

In 1955 plaintiff Harold Silver commenced business as a broker/dealer in securities in Dallas, Texas. The business consisted almost entirely of transactions in municipal bonds. It was conducted under the name of Municipal Securities Company (Municipal). Municipal also had branch offices in Lubbock, San Antonio, Longview and Amarillo, Texas.

In 1958 Silver organized Municipal Securities Company, Inc. (Municipal, Inc.) to engage in transactions in corporate securities. Its principal business was in the over-the-counter securities market.

By February 1959 Municipal had sixteen employees and in 1958 had done a gross volume of transactions of \$54,607,000. Municipal, Inc. had seven employees and for the seven months prior to February 1959 its volume of trading in over-the-counter securities was \$6,850,000.

Both plaintiffs were licensed as securities dealers under the laws of Texas. They were also registered with the Securities and Exchange Commission as broker/dealers and both are members in good standing of the National Association of Security Dealers. They are not members of the New York Stock Exchange.

The 1375 authorized memberships in the New York Stock Exchange (the Exchange) are held by individuals. There are also a large number of member firms, member corporations and allied members.

[fol. 221] Member firms are partnerships transacting business as brokers or dealers in securities, at least one of whose general partners is a member of the Exchange. Member corporations are corporations engaged in the securities business which have one or more directors who are members of the Exchange. The Exchange also has an allied membership consisting of general partners in member firms or owners of voting stock in member corporations.

The Exchange lists select corporate securities which include those of many of the country's largest and most important corporations. It provides a quality market for its members to execute orders for the purchase and sale of securities so listed for their own accounts and for the accounts of customers. The Exchange also lists a few select municipal bonds.

The market price for a listed security is established by auction on the floor of the Exchange. Market prices are in a constant state of flux, many of them rapidly changing from moment to moment. The market is extremely sensitive to variations in price, even slight fluctuations causing spurts of buying and selling.

The prices of securities listed by the Exchange and traded in on its floor are supplied by continuous stock quotation service which goes by ticker to member firms, to many non-member broker/dealers and to various other places where such quotations are of interest. The ticker provides up to the minute quotations of the prices at which listed securities are being currently traded on the floor of the Exchange. The service is carried over the facilities of the Western Union Telegraph Company and is for purposes of information only.

A large number of securities are not listed either on the New York Stock Exchange or on the other national exchanges. These securities are dealt in on the so-called over-the-counter market and are known as over-the-counter securities. The market price for over-the-counter securities [fol. 222] is established by traders at their desks in the

numerous firms dealing in securities throughout the country. Such traders are in constant communication with their counterparts in other firms seeking buyers or sellers in particular securities at the best price available. There is no central trading place for over-the-counter securities. The market in them is established by the offers to buy and sell which are communicated between traders. Thus the supply and demand of the over-the-counter market establishes the going bid and asked prices for any particular security at any particular moment of the trading day.

Extensive communication networks facilitate trading in securities. The principal medium which firms engaged in the securities business use to communicate with one another is the private wire connection. This is a direct telephone wire over which traders may instantly communicate with one another to exchange information and transact business. A trader in one firm can establish contact with a trader in another simply by flipping a switch.

Depending on the number of wire connections a firm may have, a single trader in over-the-counter securities can, by using different switches on a board before him, make offers to buy or sell and obtain offers from a variety of other firms within a matter of seconds. These are direct circuits and no dialing or waiting is necessary. Thus traders have the ease and speed of immediate and direct communication. Similar communication is also carried on by direct telemeter or teletype and, in addition, some business is transacted by the more usual means of business communication.

While many dealers in over-the-counter securities are not members of the Exchange many of the member firms and corporations, including those involved here, do an extensive business in over-the-counter securities and unlisted municipal bonds. Private wire connections between over-the-counter securities dealers, who are not members [fol. 223] of the Exchange, and member firms, facilitate transactions between them in unlisted securities and municipals, and also provide facilities by which customers of non-member firms who desire to purchase or sell listed securities can have their orders transmitted to member firms for rapid execution.

In September 1956 direct private wires were installed between the offices of Municipal and the municipal bond departments in the Dallas offices of Merrill Lynch, Pierce, Fenner & Beane, and Rauscher, Pierce & Company, who were members of the New York Stock Exchange. In May 1958 a direct private wire was installed between Municipal and Dallas Union Securities Company, which at a later date became a member of the Exchange.

The cost of these wire connections with Rauscher, Pierce and Dallas Union was charged to Municipal by Southwestern Bell Telephone Company at \$5 and \$6 per month respectively.

In June 1958 Municipal, Inc. applied to the Exchange for the approval of private wire connections with the Dallas offices of the following member firms of the Exchange: Rauscher, Pierce & Company; Dallas, Rupe & Son; Eppler, Guerin & Turner; Merrill Lynch, Pierce, Fenner & Smith; Sanders & Co.; Harris Upham & Co.; Goodbody & Co.; E. F. Hutton & Co.; Schneider, Bernet & Hickman. Each of these firms, except Merrill Lynch, Pierce, Fenner & Smith, also requested permission from the Exchange to install such private wire connections. Between June and August of 1958 the Exchange granted temporary approval for the installation of connections with all nine firms. Direct private wires were then installed at no cost to Municipal, Inc., the installation and service costs being borne by the member firms with whom the connections were maintained. A private wire connection was also installed with Dallas Union Securities Company.

In June 1958 Municipal, Inc. applied to the Exchange for the installation of its stock ticker service. The Exchange [fol. 224] granted temporary approval and the ticker service was installed in July 1958. Municipal, Inc. was billed monthly by the Exchange for this service.

In October 1958 Municipal, Inc. made arrangements with Straus, Blosser & McDowell, a member firm of the Exchange, for a direct Western Union telemeter connection with Straus, Blosser's New York office. This connection received temporary approval by the Exchange and was installed by Straus, Blosser at its own cost.

The connection was used by both firms for obtaining quotations and transacting business in both over-the-counter and listed securities. Municipal, Inc. guaranteed a minimum of \$1,000 a month in commissions on listed securities business to Straus, Blosser. The business in listed securities placed with Straus, Blosser was handled by Municipal, Inc. as an accommodation for its own customers and all commissions earned went entirely to the Straus firm.

The other member firms with whom plaintiffs maintained private wire connections also received the entire commissions on all orders for listed securities placed through them.

Thus, as of February 1959, plaintiffs had had for some time the following means of direct communication with various member firms of the Exchange: Municipal had three private wire connections with the municipal bond departments of member firms; Municipal, Inc. had ten private wire connections with the corporate securities departments of member firms, and a direct Western Union telemeter connection with Straus, Blosser in New York. Municipal, Inc. also had the Exchange's stock ticker service.

On February 12, 1959, without any notice whatsoever to either of the plaintiffs, the Exchange sent duplicate letters to eight of the ten member firms having direct wire connections with them and to Straus, Blosser with whom [fol. 225] Municipal, Inc. had its private telemeter connection. The letters advised that temporary approval for such connections had been withdrawn and directed that such connections be discontinued at once. Merrill Lynch was advised to the same effect by telephone, and Dallas Union Securities Company received the same advice by mail on February 24, 1959. By March 2, 1959 each of the member firms had complied with this directive and had severed all private wire and telemeter connections with the plaintiffs.

On February 13, 1959 the Exchange notified Municipal, Inc. that its application for stock ticker service had been disapproved and that the temporary approval previously granted was withdrawn. Western Union Telegraph Company was directed to discontinue the service as of February 18, 1959 and did so.

The action of the Exchange requiring the discontinuance of plaintiffs' wire and telemeter connections with its member firms and the withdrawal of the ticker service, was taken pursuant to Article III, §6, of its constitution, and its Rules 355, 356 and 358. Article III, §6, of the constitution provides in substance that the Board of Governors of the Exchange has the power to approve or disapprove any application for ticker service to a non-member and any wire connections between any office of any member firm or member corporation and any non-member, and may require the discontinuance of any such service or connections. Rules 355 and 356, administered by the Exchange's department of member firms, provide that no wire connections shall be established by member firms without the prior consent of the Exchange and on a form prescribed by it. They require that information concerning such arrangements be furnished periodically by member firms and provide that the Exchange may direct at any time that any means of communication which has a terminus in the office of member firms be discontinued. Rule 358 provides for applications by non-members for ticker service.

[fol. 226] On their face the constitution and rules purport to confer upon the Exchange an absolute power to approve or disapprove all wire connections and ticker service with non-member firms and to require that such connections and services be discontinued in its absolute and uncontrolled discretion.

The Exchange gave no explanation for the action which it had taken to either the plaintiffs or to any of its member firms. Silver learned of what had occurred through a telephone call from Straus, Blosser on the morning of February 13. He immediately telephoned the Exchange for an explanation. He talked to Platow, the assistant manager of the Exchange's department of member firms, who told him in substance that the Exchange did not give reasons for disapproval or withdrawal of wire and ticker connections.

On February 16 Silver came to New York and talked to Walter Coleman of the department of member firms, who informed him that it was the firmly established policy of the Exchange not to give reasons or explanations for its

disapproval of applications or its directives requiring the withdrawal of private wire connections and stock ticker service. This was the attitude of the Exchange throughout. All efforts by Silver to obtain reasons or explanations from the Exchange or an opportunity to meet any charges which had been made against him were met with categorical refusal. Efforts on his behalf by various of the member firms affected to obtain similar information were also unavailing.

On February 26, 1959 Silver wrote to Keith Funston and Edward Werle, respectively president and chairman of the Board of Governors of the Exchange, stating:

"I feel that it is most imperative that I be advised of the reasons for the discontinuance of our wires and stock ticker service in order that we may have the opportunity to set forth our position.

[fol. 227] "I appeal to your sense of justice and ask for the following: (1) Temporary reinstatement of the services, (2) that we be advised of the reasons for the action of the New York Stock Exchange, and (3) that we be given an opportunity to answer any charges and present whatever information you may require."

Six days later, on March 4, Funston replied:

"Dear Mr. Silver:

"Thank you for writing to me about your problem.

"While I can understand your position in wanting to know specific reasons for the recent action taken by the Exchange in connection with private wire and ticker service to your organization, I am sure you can also understand our position in declining to furnish such details.

"Before taking any such action, the Exchange always makes a very careful and very thorough investigation.

"I have personally reviewed the scope and results of such investigation in this case, and feel that the Exchange acted properly.

Sincerely,

G. Keith Funston"

On March 9, 1959 Werle wrote Silver to the same general effect.

At Silver's request various of the member firms with whom plaintiffs had had connections, other securities dealers, Dallas banks and leading New York banks, wrote to the Exchange stating in substance that their business dealings with plaintiffs had been entirely satisfactory, that plaintiffs had an excellent reputation, and were considered [fol. 228] to be responsible, of integrity and of good financial standing.¹ The position of the Exchange remained unchanged.

Plaintiffs then brought this action.

THE POSITIONS OF THE PARTIES.

On their motions for partial summary judgment plaintiffs contend that there is no genuine issue of material fact as to the liability of the Exchange on their claims under the anti-trust laws and that as a matter of law

¹ The following letter* from The Chase Manhattan Bank, dated March 19, 1959, is representative of letters sent to the Exchange:

"New York Stock Exchange
11 Wall Street
New York 5, New York

"Dear Sirs:

"It is our pleasure to write to you in behalf of the Municipal Securities Company of Dallas, Texas. While this firm is not a depositor of ours, it has been well and favorably known to us for some time.

"Our Bond Department has had transactions with the Municipal Securities Company in the form of municipal underwriting, syndicate and dealing operations which were always handled in an exemplary manner by the subject. Several of the principals are personally known to us and are considered to be men of ability and integrity.

"In short, we have a high regard for both the firm and its management, and are pleased to commend them to you as proper and responsible parties with which to have business dealings.

Yours very truly,

s/ JOHN C. SENHOLZI
John C. Senholzi
Assistant Vice President"

they are entitled to judgment on all issues raised by that claim except those as to the damages to which they may be entitled. They seek a final determination that the defendant is liable to them under Section 4 of the Clayton Act² for such treble damages arising out of the acts complained [fol. 229] of as they may be able to establish on a trial and that they are also entitled to a permanent injunction under Section 16 of the Clayton Act³ enjoining the Exchange from interfering with the maintenance and operation of their private wire connections with member firms and from refusing to furnish Municipal, Inc. with the stock ticker service.

In essence, plaintiffs contend (1) that the conduct of the Exchange and its members in denying them private wire and telemeter connections constitutes a concerted refusal to deal with them and is thus a per se violation of Section 1 of the Sherman Act;⁴ and (2) that the dis-

² 15 U. S. C. §15; "Suits by persons injured; amount of recovery.

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

³ 15 U. S. C. §26: "Injunctive relief for private parties; exception

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: * * *"

⁴ 15 U. S. C. §1: "Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *"

continuance of the stock ticker service is a per se violation of Section 2 of the Sherman Act⁵ since it constitutes a misuse of monopoly power which gained a competitive advantage for Exchange members over the plaintiffs in the over-the-counter securities market, and that it is also a concerted refusal to deal under Section 1.

The plaintiffs say that their private wire connections are the principal means by which over-the-counter trading [fol. 230] is accomplished and information on prices and transactions is obtained, and that the stock ticker service is the only practicable method by which they and their customers can be kept informed of the current prices and volume on the floor of the Exchange. They say that both their wire connections and the ticker service are facilities which are necessary in order to permit them to compete effectively as securities dealers in their respective fields. They contend that the withdrawal of these connections and services placed them at a substantial competitive disadvantage vis-a-vis other security dealers, including member firms of the Exchange, and resulted in a serious loss of business: They also claim that as a direct consequence of what was done by the Exchange they were forced to expend monies in attempting to obtain substitute means of communication for those which were discontinued.

The Exchange denies any illegal conduct. It claims that as a National Stock Exchange it is a regulated industry under the Securities Exchange Act of 1934, 15 U. S. C. § 78(a), et seq., and that it is exempt from the anti-trust laws to the extent it is so regulated. The constitution and rules of the Exchange were required to be and were filed with the Securities Exchange Commission at the time the Exchange registered with that body under the 1934 Act. Similar action was required and taken as to any rules subsequently adopted. (15 U. S. C. § 78(f).)

⁵ 15 U. S. C. § 2: "Monopolizing trade a misdemeanor; penalty

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *."

The Exchange urges that the acts of which the plaintiffs complain were done pursuant to its constitution and rules as duly filed with the Commission and that therefore they are outside the scope and operation of the anti-trust laws.

The Exchange contends further that even if the acts complained of are not exempt from the anti-trust laws there has not been a concerted refusal to deal in violation of such laws under the facts and circumstances of this case. [fol. 231] Finally, the Exchange asserts that under no circumstances can its conduct here be viewed as a per se violation of the Sherman Act. It contends that its conduct must be viewed in the light of the rule of reason and was reasonable within the meaning of that rule.

It was not until after suit was commenced that plaintiffs were able to obtain any information as to the reasons for the action taken by the Exchange. During the course of the rather extensive discovery proceedings conducted prior to making the present motions some idea of these reasons began to emerge. However, even then the basis on which the Exchange purported to have acted was not fully disclosed.

On this motion the Exchange states the following to be the reasons for the action which it took:

1. Investigation by the Exchange had disclosed certain matters derogatory to the Silvers upon which the Exchange relied but which it asserted to be confidential and refused to reveal. The Exchange has taken the position that it would not disclose such material unless so directed by the court or unless the plaintiffs were willing to execute releases undertaking not to sue the Exchange, its investigating agencies or its sources of information for libel or slander.

During the course of the argument of this motion before me counsel for the Exchange requested the court to receive in camera the "confidential" material relating to its investigation which he said contained "scurrilous matter with respect to the Silvers", without disclosing it to the plaintiffs. I refused to receive the material on such a basis and advised counsel that it was entirely up to the Exchange whether the material was submitted or not but that the

material would not be received unless it was disclosed to the plaintiffs and the plaintiffs given an opportunity to answer it. Defendant's counsel was given time to consider further whether such material would be submitted. It has not been submitted and neither the court nor the plaintiffs know what it is claimed to contain.

[fol. 232] 2. In 1955 the Silvers had commenced to sell certain shares of the U. S. Hoffman Machinery Corporation, some two months after acquiring them. When the shares were acquired the Silvers had stated in writing that they had "no present intention" of selling them.

3. In the application of Municipal, Inc. for approval of private wire connections and stock ticker service which required a listing of all of Silver's corporate connections for a ten year period, a long list of such connections which he submitted failed to mention two corporations with which he had been connected.

4. In 1953, some six years before the wire services were discontinued, the Department of Defense had suspended the security clearance of Intercontinental Manufacturing Co., Inc. of which Silver and his wife, who was secretary-treasurer of Municipal, Inc., had been officers, directors and substantial stockholders, and also the clearances of the Silvers individually. This action was taken under the now defunct Industrial Personnel Security Program. See *Greene v. McElroy*, 360 U. S. 474.

The Exchange denies that its conduct placed plaintiffs at any substantial competitive disadvantage or caused them any monetary loss.

There are two distinct aspects of the controversy presented on these motions, though the complaint combines both aspects in a single claim. Each aspect constitutes a separate and distinct claim for relief based on two separate and distinct alleged anti-trust violations.

These two aspects concern, first, the withdrawal of the private wire and telemeter connections, and second, the discontinuance of the stock ticket. Each will be considered as a separate claim for relief and separately treated on the merits.

THE PRIVATE WIRE AND TELEMETER CONNECTIONS.

A. The claimed exemption from the anti-trust laws.

The initial question presented for decision is whether or not, as the Exchange claims, it is exempt from the anti-trust laws by reason of the provisions of the Securities Exchange Act of 1934, and, if so, whether such exemption applies to the facts in the case at bar.

The Exchange does not claim that there is an express exemption in the statute itself, and there is none. It concedes that there is no implied over-all blanket exemption. It urges, however, that it is impliedly exempt from the anti-trust laws to the extent that it has been charged with duties and obligations by the Act. It argues that everything which the plaintiffs complain of here was done in pursuance of duties and obligations placed upon it by the Act, and that therefore it is not liable under the anti-trust laws for any of the acts complained of. In my view this position is not tenable.

Section 5 of the Securities Exchange Act, 15 U. S. C. §78(e), makes it unlawful to use the mails or any instrumentality of interstate commerce to effect or report any transaction in a security through the facilities of an exchange which has not registered with the Securities and Exchange Commission in compliance with Section 6 of the Act. Section 6 provides for the registration of a national securities exchange by the filing of a registration statement prescribed by the SEC and accompanied by: (1) an agreement to comply, and to enforce compliance by its members, with the provisions of the Act and the rules and regulations made thereunder; (2) data and information on organization, rules and procedure and membership; (3) "Copies of its Constitution * * * and of its existing bylaws or rules or instruments * * * ; and (4) An agreement to furnish to the [fol. 234] Commission copies of any amendments to the rules of the exchange forthwith upon their adoption." Subsection (b) of Section 6 provides:

"No registration shall be granted or remain in force unless the rules of the exchange include provision for

the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principle of trade."

In substance, the purpose of the Securities Exchange Act of 1934 as expressed in Section 2 of the statute was to protect the investing public as well as the national economy and the national financial system from the injurious effects of manipulative and dishonest practices in the purchase and sale of securities.

A principal concern of Congress was the practices on the national stock exchanges which had been subject to searching congressional investigation. The report of the Senate Committee which accompanied this legislation to the floor states the basis upon which Congress concluded that regulation of the Exchanges was necessary. S. Rep. No. 792, 73d Cong., 2d Sess. (1934). The report says (pp. 4-5):

"Stock exchanges have hitherto resisted proposals for their regulation by any governmental agency, on the ground that they are sufficiently able to regulate themselves to afford protection to investors.

"The contention of stock exchange authorities that internal regulation obviates the need for governmental control seems unsound for several reasons. In the first place, however zealously exchange authorities may [fol. 235] supervise the business conduct of their members, the interests with which they are connected frequently conflict with the public interest. Secondly, the securities exchanges have broadened the scope of their activities to the point where they are no longer isolated institutions, but have become such an important element in the credit structure of the country that regulation, to be effective, must be integrated with the protection of our entire financial system and the national economy. Thirdly, the control exercised by

stock exchange authorities is admittedly limited to their own members, and they are unable to cope with those practices of nonmembers which they deplore but cannot prevent. Fourthly, the attitude of exchange authorities toward the nature and scope of the regulation required appears to be sharply at variance with the modern conception of the extent to which the public welfare must be guarded in financial matters. Their adherence to the view that manipulation, pool activities, and the creation of illusory 'price mirages' are proper and legitimate, except where certain technical violations of their rules are involved, is inconsistent with the type of regulation the public interest demands.

"The manipulation of the so-called 'repeal stocks' on the New York Stock Exchange during the summer of 1933 illustrates the ineffectiveness of self-regulation * * *. The inability of the stock exchange authorities even to discover the flagrant abuses unearthed by the committee indicates that a Federal regulatory body could deal with such practices more effectively than the exchanges themselves."

It is thus plain that Congress had no intention of entrusting the national exchanges, which themselves required regulation, with general regulatory control over all phases of the securities business. What the exchanges were required [fol. 236] to do was to provide machinery by which to ensure that the listed securities business which they conducted and the conduct of their membership was in accordance with law and not inconsistent with just and equitable principles of trade. Such duties and obligations as were placed upon national exchanges by the statute are limited in scope and are confined to this subject matter only.

Congress contemplated and provided for the regulation of the securities business by the Securities and Exchange Commission which was set up for that specific purpose and not by private parties.

Indeed, that is the whole scheme of the statute. The securities business is plainly not confined to the trading

of securities on the floor of a particular national stock exchange, or, indeed, of national stock exchanges generally. It includes the extensive over-the-counter securities market, the whole underwriting and new issue field, and the purchases and sales of listed and unlisted securities other than on the floor of an exchange or over-the-counter.

Such regulatory power as Congress has chosen to assert over this broad field has been vested in the Securities and Exchange Commission which is charged with the burden of such regulation.

It is true that there was relatively little in the 1934 Act relating to the over-the-counter market except in terms of generality. However, the 1938 amendment to the Securities Exchange Act, 15 U. S. C. §78o-3, gave the Commission broadly extended powers and functions in this area. The House Committee report to accompany this legislation indicates that the 1934 Act did not give exchanges any control over the over-the-counter securities business but limited them to their own area of the securities business. H. Rep. No. 2307, 75th Cong., 3d Sess. (1938). The report states (p. 5):

"In the Securities Exchange Act of 1934 . . . the over-the-counter markets were dealt with, in brief out-[fol. 237] line, in a single section. The brevity and generality of this treatment arose from a realistic recognition of the great difficulties of working out in any detail a suitable plan of regulation at that time, in view of the fact that so little was then known concerning these markets. But, though the Congress did not at that time have before it a sufficient record of regulation, it clearly set forth the objectives of and the standards for such regulation. Section 15, in its original form, expressly contemplated the adoption by the Securities and Exchange Commission of rules and regulations concerning the over-the-counter markets 'necessary or appropriate in the public interest . . . to insure investors protection comparable to that provided by and under authority of this title in the case of national securities exchanges'. To that end, the Commission was authorized to adopt rules and

regulations providing 'for the regulation of all transactions by brokers and dealers on any such market, for the registration with the Commission of dealer and/or brokers making or creating such a market, and for the registration of the securities for which they make or create a market.'"

The 1938 Act provides mechanisms of regulation of over-the-counter broker/dealers in that area of the securities business. It permits registration with the SEC of associations of broker/dealers. To obtain registration rules must be submitted to the SEC designed to prevent fraudulent and manipulative practices and promote just and equitable principles of trade. Such rules must also provide that "members shall be appropriately disciplined, by expulsion, suspension, fine, censure, or any other fitting penalty, for any violation of its rules".

In contrast to the provisions regarding national exchanges, proceedings for review are available before the [fol. 238] SEC for members of broker/dealer associations who have been disciplined, or aggrieved persons who are refused membership. The orders of the SEC entered after such proceedings are subject to review by the courts under Section 25(a) of the Securities Exchange Act of 1934, 15 U. S. C. §78y. See, e. g., *R. H. Johnson & Co. v. Securities and Exchange Commission*, 2 Cir., 198 F. 2d 690, *cert. den.* 344 U. S. 855.

Moreover, in the 1938 amendment Congress expressly provided that in the event of conflict between any provision of the 1938 Act and any other provision of law, the provisions of the 1938 Act should prevail. (15 U. S. C. §78o-3(n).) This, of course, includes the anti-trust laws.

This again is in contrast to the provisions of the 1934 Act dealing with national stock exchanges where there is no such exemption. As Judge Medina stated with respect to the 1933 and 1934 Acts in *United States v. Morgan*, D. C. S. D. N. Y., 118 F. Supp. 621, 697:

"Do the provisions of the Act of 1933 and the Act of 1934 (except the Maloney Act) amount to an implied exemption, in whole or in part, from the provi-

sions of the Sherman Act? In my opinion they do not. Where it was thought desirable and necessary to do so the Congress made specific provision for such exemption, as in Sec. 15A(n) of the Maloney Amendment to the 1934 Act, where it was thought that the Rules of Fair Practice of the NASD might run afoul of the Sherman Act.

"It must be borne in mind that this whole statutory scheme was worked out with the greatest care by members of the Congress thoroughly aware of anti-trust problems, often in close contact and cooperation with those who were later to administer the intricate phases of this well articulated and comprehensive plan of regulation of the securities business, and in possession of the fruits of many prolonged and penetrating investigations. [fol. 239] They intended no exemption to the Sherman Act; and it is hardly probable that they would inadvertently accomplish such a result. * * *."

The Exchange argues that the scheme of the Act of 1934 was complete regulation and control of all matters relating to securities transactions and that as a registered Exchange it is therefore part of a regulated industry exempt from the anti-trust laws, at least as to all rules filed with the Commission. It is under several misconceptions.

In the first place "[r]egulated industries are not *per se* exempt from the Sherman Act * * * . [I]t is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy". *Georgia v. Pennsylvania Railroad Co.*, 324 U. S. 439, 456-457. See, also, *United States v. Borden Co.*, 308 U. S. 188; *Slick Airways v. American Airlines*, D. C. D. N. J., 107 F. Supp. 199; *cert. den.* 346 U. S. 806; Report of the Attorney General's National Committee to Study the Antitrust Laws, 261-262 (1955).

As I have pointed out, there is no repugnancy between the provisions of the Act of 1934 and the anti-trust laws in so far as any rules, required to be filed by a national exchange, attempt to intrude upon the over-the-counter securities market. There is not the slightest indication of

congressional intent to grant any exemption from the anti-trust laws with respect to the acts with which we are concerned here.

Beyond this, it is plain that this is not a closed regulatory system which is a substitute for or supersedes the anti-trust laws. The SEC does not give affirmative sanction to the rules filed by national exchanges. Its grant of registration to an exchange goes no farther than to indicate that the rules filed meet the minimum standards required of ex-[fol. 240] changes by the statute so as to insure that its members will comply with the provisions of the law and shall not conduct themselves in a manner inconsistent with just and equitable principles of trade.

Moreover, and equally important, there is no procedure by which a non-member aggrieved by action of the Exchange purportedly taken under its filed rules, may resort to administrative proceedings before the SEC to redress his grievances or to attack the rules themselves, either at the time of filing or thereafter.

The position in which plaintiffs here find themselves illustrates this. If the theory of the Exchange were correct these plaintiffs would not only have no remedy before the Commission but would find themselves barred from remedy in the courts also on the mere say-so of a private association. This is in marked contrast to what occurs in a recognized closed regulatory system. See, e.g., Shipping Act, 46 U. S. C. §801, et seq.; Interstate Commerce Act, Part I, 49 U. S. C. §1, et seq.; Natural Gas Act, 15 U. S. C. §717, et seq.

Plainly the provisions of the Act requiring an exchange to file its constitution and rules and to register are not a substitute for nor do they supersede the anti-trust laws.

The Exchange also urges that since orders and information on listed securities may be transmitted over the private wire connections with its members, it is entitled for the protection of its own business to direct that such connections with plaintiffs be severed in its sole discretion.⁶ As-

⁶ It may be noted that the definition of an Exchange "facility" in subsection 3a(2) of the 1934 Act, 15 U. S. C. §78c(a)(2), does not include private wire connections between members and non-

suming for purposes of argument, and without deciding [fol. 241] the doubtful proposition that actions of the Exchange in prohibiting its members from using private wire connections with an individual non-member to communicate with respect to its listed securities were exempt from the anti-trust laws, there is no warrant for such an exemption with respect to transactions or information in over-the-counter securities. The Exchange may not extend whatever power it may possess over its own limited market in the securities which it lists to an entirely different phase of the securities business without being answerable for any restraints of trade which it might thus impose. There is nothing in the statute to warrant a different result.

The question we are dealing with here is not whether the acts of the Exchange were in conformity with its rules but whether or not its acts violated the anti-trust laws. It is not necessary to determine here whether some exemption from the anti-trust laws may or may not be impliedly granted to the Exchange by the provisions of the Act of 1934 if its acts directly concern the business in listed securities carried on on the floor of the Exchange. But the question here concerns an entirely different phase of the securities business, the over-the-counter and unlisted municipal markets. The Exchange is not remotely authorized or empowered by the statute to exercise any powers beyond the scope of its own business in listed securities and the ethical conduct of its own membership. It is not entitled to regulate or control conduct of its members which does not concern the listed securities business which the Exchange carries on in pursuance of the only purpose for which it was established.

Providing that its members do not indulge in conduct which is illegal or inconsistent with just and equitable

members. A "facility" is defined as including an exchange's " * * * premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or *any service thereof for the purpose of effecting or reporting a transaction on an exchange* (including, among other things, any system of communication *to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange*) * * *." (Emphasis added.)

principles of trade, an exchange has neither the power nor the authority to determine with whom its members may or may not deal or to direct them to desist from dealing with non-member broker/dealers engaged in transactions in [fol. 242] over-the-counter securities and municipals. If it does so it does so at its peril and is subject to such appropriate action as may be taken under the anti-trust laws.

B. The Claimed Anti-Trust Violations.

Since the acts of the Exchange which are the subject of this action are not exempt from the anti-trust laws, the next question is whether its acts violated these laws.

It is by now well settled that a concerted refusal to deal—that is to say, joint action by two or more persons in refusing to deal with another—violates Section 1 of the Sherman Act and is illegal per se. *Radiant Burners v. Peoples Gas Light & Coke Co.*, 364 U. S. 656; *Klor's v. Broadway-Hale Stores*, 359 U. S. 207; *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457. See, also, *Northern Pacific Railway Co. v. United States*, 356 U. S. 15; *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U. S. 211, 214; *United States v. Columbia Steel Co.*, 334 U. S. 495, 522.

The Exchange asserts that the acts of itself and its members in the severance of the private wire connections with the plaintiffs are not a concerted refusal to deal as that term is used in the cases.

The Exchange does not dispute that the severance of connections was the result of joint action between itself and its members. It concedes that the discontinuance by member firms of private wire connections with the plaintiffs was done in accordance with defendant's instructions and was not the independent act of each member.

Upon being admitted to membership in the Exchange, each member binds itself to comply with the directives issued by the Exchange pursuant to its constitution and rules. Failure to act in conformity with such instructions subjects a member to disciplinary action and possible expulsion under Section 6, Article XIV of the constitution. Each of the member firms "by entering into this com-

[fol. 243] bination" has "surrendered himself completely to the control of the [Exchange]" with respect to the means by which he may do business or communicate with non-members. *Anderson v. Shipowners Association*, 272 U. S. 359, 362. As was said in that case (pp. 364-5):

" * * * it appears that each shipowner and operator in this widespread combination has surrendered his freedom of action in the matter of employing seamen and agreed to abide by the will of the associations. * * *. These shipowners and operators having thus put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce according to their own choice and discretion, it follows * * * that the combination is in violation of the Anti-Trust Act."

The effect of this combination was to bar the member firms named as co-conspirators from exercising their freedom to carry on trade and commerce with these plaintiffs according to their own choice and discretion. They have placed restraints upon their own liberty of action and have foreclosed themselves from exercising their own independent business judgment with respect to their dealings with these plaintiffs. They are limited in such dealings by the dictates of the combination which has substituted its business will and judgment for their own. This is one of the evils at which the Sherman Act is directed. *Klor's v. Broadway-Hale Stores*, *supra*; *United States v. First National Pictures*, 282 U. S. 44; *Anderson v. Shipowners Association*, *supra*.

Moreover, the group action which was taken resulted in the denial to these plaintiffs of the opportunity to do business with the members of the Exchange upon the same terms and conditions as others in the over-the-counter and municipal securities markets in which they were engaged. As far as the Exchange, its members and the plaintiffs [fol. 244] are concerned there was no longer a free and untrammelled market.

Once it is shown that there was group action which produced these effects it is unnecessary to go farther. Such

a concerted refusal to deal is in the forbidden category. It is per se violation of Section 1 of the Sherman Act which is designed "to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade". *Ramsey Co. v. Associated Bill Posters*, 260 U. S. 501, 512. In its very nature and character the action of the group interferes with the normal and natural flow of interstate commerce and the interplay of free competition therein. Section 1 of the Sherman Act forbids all combinations of such a nature.

It is not necessary to show that the combination prohibited all dealings between the member firms involved and the plaintiffs, as the Exchange seems to contend. The effect of the Exchange directive to the members of the combination was to foreclose them from dealing with the plaintiffs by means of the private wire connections which were a normal means of doing business in over-the-counter and unlisted municipal securities. The combination operated to deprive plaintiffs of a means of doing business which was of substantial value to them in the conduct of their business. The very nature of the business in which plaintiffs were engaged makes this abundantly plain. This means of doing business was available to others who did not fall within the proscription directed against plaintiffs. There were numerous other non-member broker/dealers in Dallas, and in other parts of the country, who maintained such private wire connections with member firms and continued to use them.⁷

[fol. 245] "[T]he fact that an agreement to restrain trade does not inhibit competition in all of the objects of that trade cannot save it from the condemnation of the Sherman

⁷ This is made abundantly clear by a letter of February 16, 1959 from Schneider, Bernet & Hickman, Inc., a member corporation, to the Exchange seeking clarification of the Exchange's order of discontinuance of the private wire connection with Municipal, Inc.:

"A direct private wire to the Municipal Securities Company, Inc. * * * is operating at the present time, as is a private wire to most of the other members of the N. A. S. D. in Dallas." (Emphasis added.)

Act." *Associated Press v. United States*, 326 U. S. 1, 17. An offer to deal only under discriminatory terms or conditions is just as violative of the Sherman Act and its purposes as a refusal to deal altogether. *Associated Press v. United States*, *supra*; *Klor's v. Broadway-Hale Stores*, *supra*; *United States v. First National Pictures*, *supra*.

The Exchange urges its action cannot violate the Sherman Act since there are other means of communication with its member firms which are available to the plaintiffs. But the Exchange does not deny that the private wire connections are the fastest and most direct means of communication between traders in a business which involves rapidly fluctuating prices and where up to the minute information is of the essence. It may be that these communications are not indispensable to the conduct of the plaintiffs' business and that they could somehow get along with substitute means of communication. But the indispensability test has long been rejected as a standard of Sherman Act violation. As the court said in the *Associated Press* case, *supra*, at p. 18:

"The proposed 'indispensability' test would fly in the face of the language of the Sherman Act * * *. Moreover, it would make that law a dead letter in all fields of business, a law which Congress has consistently maintained to be an essential safeguard to the kind of private competitive business economy this country has sought to maintain."

The conduct of the Exchange and its members cannot be saved by the claim that they were acting reasonably under the specific circumstances. Nor is it necessary to show that the boycott fixed or regulated prices or injured the over-the-counter and municipal securities markets generally. A concerted refusal to deal is deemed to inflict public injury of that kind by its very nature. *Klor's v. Broadway-Hale Stores*, *supra*; *Fashion Originators' Guild v. Federal Trade Commission*, *supra*.

It matters not whether the methods pursued by the combination to attain its objectives are claimed to be reasonable or justifiable under the circumstances or are for bene-

ficial purposes. The combination cannot escape the proscriptions placed by the law upon its conduct by any showing of reasonableness or justification. The combination is *per se* illegal and the prohibition against it is absolute however extenuating the conditions may be which gave rise to it. As stated in *Fashion Originators' Guild v. Federal Trade Commission*, *supra*, at p. 468:

"[T]he reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination."

See, also, *Anderson v. Shipowners Association*, *supra*; *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association*, 274 U. S. 37, 47; *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30, 43; Report of the Attorney General's National Committee to Study the Antitrust Laws 133 (1955); Handler, Recent Developments In Antitrust Law: 1958-1959, 59 Col. L. Rev. 843, 862 (1959); Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 875 (1955); 41 Col. L. Rev. 941 (1941).

The policy of the statute is to leave to each trader individually the determination as to whether to deal with any particular person and to forbid such a determination by group action regardless of the reasons therefor. As the court said in *Fashion Originators' Guild v. Federal Trade Commission*, *supra* (p. 468):

"[I]t was not error to refuse to hear the evidence offered * * *. [T]he unlawful combination [cannot] [fol. 247] be justified upon the argument that systematic copying of dress designs is itself tortious, or should now be declared so by us. * * *. [E]ven if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law."

Thus, the contention of the Exchange that this is a case in which a rule of reason must be applied under which its

conduct could be justified, is without merit. There is no room here for the application of any rule of reason for which the Exchange contends since the facts establish a concerted refusal to deal which is intrinsically unreasonable in the light of the purpose and intent of the statute.

It may be noted, however, that even if the position of the Exchange that this is a case for the application of a rule of reason were correct the Exchange would not be exonerated here. The test which the Exchange seeks to apply is merely whether there was justification for its conduct with respect to these particular plaintiffs. It claims that its actions were based upon information showing that Silver, the sole proprietor of Municipal, and the president and sole stockholder of Municipal, Inc., and Mrs. Silver, its secretary-treasurer, were untrustworthy persons of bad repute and doubtful character and that its action in directing its member firms to discontinue the wire connections with the plaintiffs was therefore justified.

The record fails to substantiate these charges against the Silvers.

The Exchange asserts that it obtained such information as a result of investigations conducted in connection with applications of Municipal, Inc. for approval of private wire connections and for stock ticker service. The information obtained is in four different categories:

1. Certain material claimed to be of a confidential nature is said to disclose "scurrilous" information concerning [fol. 248] Mr. and Mrs. Silver. Such material is not in this record. All that is before the court is the bare assertion that the information is "scurrilous", without a single fact to support such very serious accusations. Not only have the plaintiffs had no opportunity to rebut such undisclosed material, neither they nor the court know what it consists of.

The Exchange has taken the position that it will not make this material available to the plaintiffs unless the Silvers are willing to execute releases from any liability for defamation to the Exchange, its investigators and its so-called confidential sources, or unless the court directs its submission. Its offer to submit the material to the

court in camera without disclosing it to the plaintiffs was refused. As I have previously indicated, the Exchange was given ample opportunity to place the material in the record if it so desired so that the plaintiffs might have an opportunity to answer it. The Exchange failed to do so. (See *supra*, p. 139).

All that the court can assume in view of the position taken by the Exchange is that the material consists of dubious gossip emanating from unreliable sources and is totally unworthy of credence.

In so far as this portion of the material on which the Exchange relies to justify its conduct is concerned, the position which it has taken, far from demonstrating that it had a reasonable basis for its action, indicates the contrary.

2. The Exchange claims that the Silvers disposed of certain shares of U. S. Hoffman Machinery Corporation stock in 1955 after they had executed an agreement when they acquired the stock that it was their present intention to hold it for investment purposes and not to dispose of it. There is no merit to the claim that these facts indicate that the Silvers were untrustworthy. The SEC was fully apprised of these transactions and acquiesced in the sale [fol. 249] without the need for a registration certificate. The material that was submitted to the SEC in justification of the sale, which is uncontroverted by the Exchange, demonstrates that the Silvers did not act in bad faith either in the statements made at the time of acquisition or in making the sales. No doubt the Exchange could readily have obtained such information from the SEC at the time of its investigation which would have refuted the charge. In any event, it could easily have been refuted by the Silvers had they been given an opportunity to do so.

3. The Exchange states that in the applications of Municipal, Inc. for approval of private wire connections and stock ticker service it failed to list all of Silver's corporate connections for a ten year period by omitting connections with The Joggler Corporation and Trans-Mar, Inc. It makes no showing that these omissions were intentional or material and Silver categorically denies that they were.

There is nothing to show that there was anything wrong with these corporations or anything remotely improper in Silver's connection with them. For all that appears here, had these omissions been called to Silver's attention he could have given the Exchange any information which it desired on the subject.

4. Finally, the Exchange relies on the fact that the security clearance of the Silvers and of Intercontinental Manufacturing Co., with which they were connected, had been suspended by the Department of Defense in 1953 under the Industrial Personnel Security Program.

In *Greene v. McElroy*, *supra*, decided in June 1959, the Supreme Court determined that the Industrial Personnel Security Program was unlawful and void. It held that since the Program afforded neither the safeguards of confrontation nor of cross examination to those against whom proceedings were instituted it was wholly unauthorized in the absence of explicit authorization from either the President [fol. 250] or Congress. It did not reach the constitutional question as to whether the procedures violated due process.

On August 23, 1960 the actions of the Central Industrial Personnel Security Board revoking the security clearances of the Silvers, were vacated and expunged from the records by the Department of Defense in accordance with *Greene v. McElroy*.

At the time the Exchange took action against the plaintiffs in February of 1959 it had before it only the bare fact that security clearances of the Silvers had been suspended. Its efforts to obtain further information from the Department of Defense were met with the reply that all the material was confidential.

Thus, in so far as appears by this record, the Exchange chose to rely upon the naked fact that the security clearances had been suspended without any information as to the nature of the charges which had been made against the Silvers more than five years before, or the grounds upon which the Department of Defense had acted.

When the Exchange acted the Industrial Personnel Security Program had already come under attack in the courts and *Greene v. McElroy* was decided less than four

months later. In the meantime the Exchange had denied to the plaintiffs the very right to specification of charges against them and confrontation which had been denied by the Industrial Personnel Security Board. Neither then nor thereafter when *Greene v. McElroy* had been decided, did the Exchange make any effort to inform the plaintiffs that the denial of security clearances was a part of the basis for its action or to give them any opportunity to make an explanation. Instead, the Exchange has consistently taken the position that the denial of security clearances was sufficient justification for its action, despite the fact that the Program has been held to be unlawful and void and the action on which the Exchange relied has been vacated and expunged from the official record.

[fol. 251] The Exchange has placed in the record letters obtained, during pre-trial proceedings in this case, from the files of the Silvers, received by them from the Industrial Personnel Security Board at the time their clearances were suspended. These letters indicate that one of the reasons for denying security clearance was that the Board considered that the Silvers were not reliable and trustworthy. The action of the screening division was affirmed by the appeal division and by the Secretary of Defense. As the Supreme Court pointed out in *Greene v. McElroy*, such conclusions were reached without the right of confrontation or cross-examination and were entirely unauthorized. The defense authorities themselves have voided their own action and the procedures are no longer used.

It appears that the Exchange claims the right to adopt the same procedures with respect to the Silvers as were found to be unauthorized by the Supreme Court in the case of the Defense Department where vital national security interests were at stake. In my view the conduct of the Exchange cannot be justified by the denial of security clearance under the circumstances here disclosed, nor by any of the other facts and circumstances upon which it relied.

It may be noted that, upon deposition, Walter Coleman of the defendant's department of member firms, expressly stated that the action of the Exchange was not based on any criminal convictions of either of the Silvers, on any

false or misleading statements made by them to the SEC in any application for the registration of securities, or on any specific matters regarding securities transactions other than the alleged transactions in U. S. Hoffman stock.

The inescapable conclusion from what is relied on by the Exchange in justification is that it acted arbitrarily and unreasonably in directing that plaintiffs' wire connections be severed.

[fol. 252]

C. The Right of Plaintiffs to Partial Summary Judgment.

Since I have held the conduct of the Exchange is in violation of Section 1 of the Sherman Act, the only remaining question is whether the plaintiffs are persons who are injured in their business or property by reason of such conduct under Section 4 of the Clayton Act. This the plaintiffs have clearly established.

The withdrawal of private wire and telemeter connections between the plaintiffs and the eleven member firms of the New York Stock Exchange with whom they were maintained could not fail to injure the plaintiffs' business. Such connections were available to most of the other broker/dealers who were members of the National Association of Security Dealers in Dallas. The Exchange concedes that these connections were a more rapid means of communication with its members than any other. This is quite apart from the fact that the connections were installed and maintained at no cost to Municipal, Inc., and at nominal cost to Municipal. Plaintiffs have shown actual out-of-pocket expenses for substitute facilities.

Thus, under Section 4 the plaintiffs, as persons injured in their business by reason of a violation of the Sherman Act, are entitled to judgment that the Exchange is liable to them for threefold the damages by them sustained and the cost of suit, including reasonable attorney's fee.

The question of the amount of damages and costs to which plaintiffs may be entitled raises questions of fact which cannot be determined on this motion and must be left to a trial.

* See Note 7, *supra*, at p. 152.

It is plain that the conduct of the Exchange has continued and will continue and will cause loss and damage to these plaintiffs in the future unless enjoined by this court. Plaintiffs are therefore entitled to a decree under Section 16 of the Clayton Act permanently enjoining the [fol. 253] defendant from preventing, prohibiting or interfering with the establishment, maintenance and operation of private wire and telemeter connections between its member firms and the plaintiffs.

II.

THE STOCK TICKER SERVICE

The claim of Municipal, Inc. that the action of the Exchange in withdrawing temporary approval of its application for the stock ticker service and discontinuing such service to it was in violation of the anti-trust laws is on a somewhat different footing from the claims with relation to the private wire connections.

The stock ticker service is supplied by the Exchange directly to those receiving it, transmitted through Western Union. Applications for the service are made directly to the Exchange and approved or disapproved by its Board of Governors. The primary attack which Municipal, Inc. makes on the action of the Exchange with respect to the stock ticker service involves alleged violation of Section 2 of the Sherman Act rather than Section 1. Municipal, Inc. asserts that the Exchange has a monopoly over the current quotations of the listed stocks traded in on its floor and over their dissemination. The denial by the Exchange of the stock ticker service to Municipal, Inc. is claimed to be a misuse of this monopoly power for the purpose of obtaining a competitive advantage for its members in the entirely different over-the-counter securities market to the competitive disadvantage of Municipal, Inc. See *United States v. Griffith*, 334 U. S. 100. See, also, *International Salt Co. v. United States*, 332 U. S. 392.

Municipal, Inc. recognizes that in order to succeed on this theory it must establish that members of the Exchange obtained a competitive advantage from the action of the Exchange and that Municipal, Inc. has sustained a competi-

[fol. 254] tive disadvantage. It admits that there are questions of fact on this issue which are not resolved in the papers before me on this motion and which require a trial. It therefore is not entitled to partial summary judgment on this theory.

As a second string to its bow, however, Municipal, Inc., urges that the withdrawal of ticker service, like the severance of private wire connections, is the result of a concerted refusal to deal by the Exchange and its members and therefore is a *per se* violation of Section 1 of the Sherman Act which entitles it to partial summary judgment similar to that granted with respect to the private wire connections.

The Exchange, on the other hand, contends that the individual members and member firms of the Exchange have nothing to do with the grant or refusal of the ticker service to non-members, which is a property right of the Exchange itself. It points out that the stock ticker service goes directly from the Exchange to those subscribing to it, and that the individual members or member firms have nothing to do with the service. Members are not called upon to take any action on applications for the service. Nor have they any voice either in inaugurating the service or terminating it. They are not even notified by the Exchange when applications are filed or when they are granted.

Thus, says the Exchange, the withdrawal of the stock ticker service cannot be the result of concerted action but is the action of the Exchange alone, acting as an individual trader and not in concert with others.

The Exchange does not claim the right to apply its rules in an arbitrary or discriminatory manner. But it claims that it is entitled to take such action as it deems appropriate as an individual trader protecting its own property rights and that the group action which is required to establish a *per se* violation of Section 1 of the Sherman Act on the ground of concerted refusal to deal is wholly lacking here. *Cf.* United States v. Parke, Davis & Co., 362 U. S. [fol. 255] 29; United States v. Bausch & Lomb Optical Co., 321 U. S. 707; Federal Trade Commission v. Beech-Nut Packing Co., 257 U. S. 441; Frey & Sen v. Cudahy Packing

Co., 256 U. S. 208; United States v. Colgate & Co., 250 U. S. 300.

The Exchange is a New York unincorporated association. Municipal, Inc. takes the position that the Exchange therefore can take no action as an individual trader and that any action which it takes is necessarily, by reason of the nature and character of its organization the collective action of all of its members. Municipal, Inc. argues that the withdrawal of the stock ticker service by the Exchange must have been the result of collective action since the Exchange could act in no other way. It urges, therefore, that the action of the Exchange must be a concerted refusal to deal which is a *per se* violation of Section 1 of the Sherman Act for the same reasons as applied to the actions of the Exchange and its members with respect to the private wire connections.

The Exchange has a property interest in its own quotations and is entitled to take reasonable measures to protect that interest. See *Moore v. New York Cotton Exchange*, 270 U. S. 593; *Hunt v. New York Cotton Exchange*, 205 U. S. 322; *Board of Trade v. Christie Grain and Stock Co.*, 198 U. S. 236. To this extent it may have some limited exemption from the anti-trust laws with respect to the ticker service which disseminates such quotations. I do not pass on that question here.

In my view, whether or not under the circumstances here the proprietary interest of the Exchange in the stock ticker service and the action which was taken concerning that interest was that of a single trader protecting its own property rights and thus not forbidden by Section 1 of the Sherman Act, or is the concerted refusal to deal prohibited by Section 1, should not be finally determined on the record now before me. This is a question on which no definitive authority has been called to my attention and I have found [fol. 256] none. *Cf. Sperry Products v. Association of American Railroads*, 2 Cir., 132 F. 2d 408, *cert. den.* 319 U. S. 744; *Chamber of Commerce v. Federal Trade Commission*, 8 Cir., 13 F. 2d 673; *Martin v. Curran*, 303 N. Y. 276; *Kirkman v. Westchester Newspapers*, 287 N. Y. 373; *Gillette v. Allen*, 269 App. Div. 441. On this phase of the case it appears to me that application of the summary

judgment rule is questionable and I consider it sound judicial administration to permit a trial so as to present a more solid basis for definitive findings and conclusions. Among other things, there should be a full exploration of the facts as to the nature, character and composition of the Exchange, its organization and the manner in which the Exchange takes action and took action on matters such as this. This is in addition to the issues with respect to competitive advantage or disadvantage arising under the plaintiffs' first theory on this phase of the case. See *United States v. Bethlehem Steel Corp.*, D. C. S. D. N. Y., 157 F. Supp. 877, 879; *Kennedy v. Silas Mason Co.*, 334 U. S. 249, 256-257; 6 *Moore Federal Practice* 2169 (2d ed. 1953). Moreover, there must be a trial in any event on the issue of damages.

The motion of Municipal, Inc. for partial summary judgment with respect to its claim based on withdrawal of the stock ticker service will therefore be denied.

One further point remains.

In the brief memorandum of decision which I heretofore filed on these motions on May 19, 1961 I stated that while Municipal, Inc. was not entitled to partial summary judgment it had established its right to a preliminary injunction under Section 16 of the Clayton Act and Rule 65, F. R. C. P., restraining defendant pending the final determination of this action from refusing to make the stock ticker service available to it. In again reviewing the papers submitted by the plaintiffs in support of their motions during the preparation of this opinion I find that I overlooked the following statement at the end of their reply affidavit:

[fol. 257]. "It should be noted that plaintiff MSC, INC. does not seek preliminary injunctive relief, but only partial summary judgment on the issue of liability and summary judgment for permanent injunctive relief.

"As I stated in my moving affidavit, MSC, INC. has ceased to function as an operating business organization. It has no employees and retains only its corporate existence, its Texas license as a securities dealer, its broker-dealer registration with the Securi-

ties and Exchange Commission, its membership in the National Association of Securities Dealers, and certain unliquidated assets. If MSC, INC. were to be granted a preliminary, rather than a permanent injunction, I would not and could not attempt to re-establish it as a functioning organization. First of all, employees would be unwilling to return to work on a temporary basis accorded by a preliminary decree. Secondly, as a practical matter, I could not undertake the substantial financial investment which is required to restore MSC, INC. as an operating organization under such circumstances."

Regardless of the merits, Municipal, Inc., by making the statement which I have quoted, has waived any rights which it might have had to a preliminary injunction and is not entitled to such relief. For this reason I withdraw that portion of my memorandum decision which stated that Municipal, Inc., was entitled to preliminary injunctive relief and such relief will be denied.

It may be noted that pursuant to 28 U. S. C. §1292(a) the defendant may take an appeal to the Court of Appeals from that portion of the order to be entered which grants a permanent injunction against it with respect to the private wire connections. In my view the other issues determined by the order to be entered involve controlling questions of law as to which there is substantial ground [fol. 258] for difference of opinion, and an immediate appeal on such issues also may materially advance the ultimate determination of the litigation. The order to be entered may so state pursuant to Section 1292(b).

Settle order in accordance with this opinion on seven (7) days' notice.

Dated: New York, N. Y., June 16, 1961.

Frederick vP. Bryan, U. S. D. J.

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ORDER OF DISTRICT COURT—August 2, 1961

The cause having been heard on the motion of plaintiff Harold J. Silver, d/b/a Municipal Securities Company, and plaintiff Municipal Securities Company, Inc. for summary judgment pursuant to Rule 56(a) and (c) of the Federal Rules of Civil Procedure on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law on the first cause of action set forth in their complaint, except with respect to the amount of the damages, and for other appropriate relief, and upon the motion of plaintiff Harold J. Silver, d/b/a Municipal Securities Company, for preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, and upon due and careful consideration of all of the papers, documents and materials heretofore submitted to the Court, and after having heard oral argument [fol. 259] thereon, and the Court having filed its memorandum decision dated May 19, 1961 and its written opinion dated June 16, 1961, containing the Court's findings of fact and conclusions of law and defendant's motion for reargument of plaintiffs' motions having been denied by memorandum opinion dated July 14, 1961, it is Ordered:

(a) That the motion of plaintiff Harold J. Silver, d/b/a Municipal Securities Company, for preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, be and the same is hereby denied;

(b) That with respect to the action of the defendant in ordering the discontinuance of stock ticker service to plaintiff Municipal Securities Company, Inc., plaintiff Municipal Securities Company, Inc.'s motion for summary judgment under Sections 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§15 and 16, be and the same is hereby denied;

(c) That with respect to the action of the defendant in ordering the withdrawal of plaintiffs' private wire and tele-

meter connections, plaintiffs' motion for summary judgment as to the liability of the defendant under Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. §15, except as to the amount of the damages and costs to which plaintiffs may be entitled, be and the same is hereby granted;

(d) That with respect to the action of the defendant in ordering the withdrawal of plaintiffs' private wire and telemeter connections, plaintiffs' motion for summary judgment for permanent injunctive relief under Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. §26, be and the same is hereby granted;

(e) That defendant be and hereby is permanently enjoined from preventing, prohibiting or interfering with the establishment, maintenance and operation of private wire and telemeter connections between plaintiffs and defendant's member firms and member corporations for the [fol. 260] purpose of trading or otherwise dealing, or communicating with respect to transactions, in over-the-counter securities, municipal bonds, or securities not listed for trading on the New York Stock Exchange;

(f) That within ten days from the date of the entry of this order the defendant inform, in writing, Dallas, Rupe & Son, Inc.; Sanders & Co.; Goodbody & Co.; Merrill Lynch, Pierce, Fenner & Smith, Incorporated; Harris, Upham & Co.; Dallas Union Securities Co., Inc.; Schneider, Bernet & Hickman, Inc.; Rauscher, Pierce & Co. Inc.; Eppler, Guerin & Turner, Inc.; E. F. Hutton & Co.; and Straus, Blosser & McDowell, that defendant has no objections to the operation and maintenance of private wire or telemeter connections between plaintiffs and said member firms or member corporations for the purpose of trading or otherwise dealing, or communicating with respect to transactions, in over-the-counter securities, municipal bonds, or securities not listed for trading on the New York Stock Exchange;

(g) That all further proceedings in this Court shall be stayed pending disposition of appeal from this order or any part thereof by the United States Court of Appeals for the Second Circuit.

In accordance with 28 USC §1292 (b) the Court is of the opinion that the issue as to the liability of defendant as determined by subparagraph (b) and (c) above involve controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal therefrom may materially advance the ultimate termination of the litigation.

Dated: New York, N. Y., August 2nd, 1961.

Frederick vP. Bryan, U. S. D. J.

[fols. 261-263]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL—August 31, 1961

Sirs:

Notice is hereby given that defendant New York Stock Exchange hereby appeals to the United States Court of Appeals for the Second Circuit from that part of the order of Honorable Frederick vP. Bryan, entered in the office of the Clerk of the United States District Court for the Southern District of New York on August 3, 1961, designated therein as paragraphs (d) and (e), granting plaintiffs' motion for summary judgment for permanent injunctive relief under Section 16 of the Clayton Act, 15 U. S. C. §26, and permanently enjoining defendant from, among other things, interfering with the maintenance of private wire connections between plaintiffs' and defendant's member firms.

Dated: New York, N. Y., August 31, 1961.

Yours, etc.,

Milbank, Tweed, Hope & Hadley, 1 Chase Manhattan Plaza, New York 5, N. Y., Attorneys for Defendant.

To: Messrs. Dickstein, Shapiro & Galligan, 20 East 46th Street, New York 17, N. Y., Attorneys for Plaintiffs.

[fol. 264]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY,
and MUNICIPAL SECURITIES COMPANY, INC., Plaintiffs,

—against—

NEW YORK STOCK EXCHANGE, Defendant.

NOTICE OF MOTION—August 9, 1961

Sirs:

Please Take Notice that upon the annexed affidavit of Edward J. Reilly, Jr., sworn to August 4, 1961, and the exhibits annexed thereto, the undersigned will move this Court on August 16, 1961, for an order, pursuant to 28 U.S.C. §1292(b) and Rule 10(d) of the Rules of this Court, permitting defendant to appeal from that part of the order of Honorable Frederick vP. Bryan, filed in the office of the Clerk of the United States District Court for the Southern District of New York on August 3, 1961, granting plaintiffs' motion as to the liability of defendant under Section 4 of the Clayton Act, 15 U.S.C. §15, and for such other and further relief as may be just and proper.

Dated: New York, N. Y., August 9, 1961.

Yours, etc.,

Milbank, Tweed, Hope & Hadley, 1 Chase Manhattan
Plaza, New York 5, N. Y., Attorneys for Defen-
dant.

To: Messrs. Dickstein, Shapiro & Galligan, 20 East 46th
Street, New York 17, N. Y., Attorneys for Plaintiffs.

[fol. 265]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Title omitted]

AFFIDAVIT OF EDWARD J. REILLY, JR.

State of New York,
County of New York, ss.:

Edward J. Reilly, Jr., being duly sworn, says:

I am an attorney associated with the firm of Milbank, Tweed, Hope & Hadley, attorneys for defendant, and am fully familiar with the pleadings and proceedings heretofore had herein. I make this affidavit in support of defendant's application for an interlocutory appeal under 28 U.S.C. § 1292(b).

The Nature of the Action

The action was commenced on April 3, 1959, in the United States District Court for the Southern District of New York.

Plaintiff Harold J. Silver, doing business as Municipal Securities Company (herein "Municipal"), was engaged primarily in the business of buying, selling and underwriting municipal bonds. Plaintiff Municipal Securities Company, Inc. (herein "Municipal, Inc.") was engaged primarily in transactions in over-the-counter securities.

[fol. 266] Defendant New York Stock Exchange (herein "the Exchange") is a New York unincorporated association registered as a national securities exchange under the Securities Exchange Act of 1934.

The complaint alleges three causes of action. The first charges that the Exchange conspired with certain of its member firms to withdraw private wire connections between such member firms and plaintiffs and to withdraw the Exchange's continuous stock ticker quotation service from Municipal, Inc., and that such withdrawals were

violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The second charges that the Exchange wrongfully induced the member firms to breach contracts for wire connections with plaintiffs. The third charges that the action of the Exchange constituted an intentional wrong without reasonable cause.

The Facts

In September, 1956, without the knowledge or approval of the Exchange, Municipal had installed private wire connections between its office and two member firms in Dallas, Texas. Thereafter, in June, 1958, Municipal, Inc. submitted an application to the Exchange for approval of private wire connections with a number of member firms. The application was in the form of an agreement in which Municipal, Inc. stated it desired the private wire connections "by means of which we [Municipal, Inc.] may obtain continuous quotation of the New York Stock Exchange." The obvious purport of the agreement is that it relates to the obtaining of the Exchange's quotations and to nothing else. For example, paragraph 3 states that Municipal, Inc. would not use the quotations of the Exchange for any illegal [fol. 267] purpose. In paragraph 4 Municipal, Inc. agreed that the quotations of the Exchange were for its individual use and would not be furnished to any other person and it further agreed that if such quotations were furnished to anyone without the Exchange's approval the Exchange might sue such person to prevent the receipt or use of such quotations. Other provisions—all relating solely to the use of the Exchange's quotations—are set forth in paragraphs 5 through 9. The agreement also authorized the discontinuance of the private wire connections whenever the Exchange withdraws its approval.

Municipal, Inc. furnished the Exchange with information concerning it and its officers and on receipt thereof the Exchange gave temporary approval of the requested private wire connections. A few days later Municipal, Inc. applied for stock ticker service and the Exchange gave temporary approval pending further processing.

After receipt of Municipal, Inc.'s applications for the private wire connections and stock ticker service, the Exchange, following its usual practice, had an investigation made of Municipal, Inc. and its officers by independent investigating agencies. The investigation disclosed, among other things, that in 1953 the Defense Department had suspended the security clearance of Intercontinental Manufacturing Company, Inc., a corporation of which Mr. and Mrs. Silver had been officers, directors and substantial stockholders, that the security clearance of the Silvers had been suspended, and that their efforts to have the suspension removed were unsuccessful. It also disclosed that the Silvers had violated a written agreement with U. S. Hoffman Machinery Corporation made at the time of the exchange of shares of stock of that corporation for shares [fol. 268] of stock of Intercontinental. One of the charges made by the Defense Department was that the Silvers' "behavior, activities and associations tend to show that . . . [they] are not reliable and trustworthy." The investigation also brought forth further disclosures with respect to the Silvers of a derogatory nature.

The Exchange concluded that on the basis of all the information obtained concerning the Silvers that the temporary approval of the private wire connections and stock ticker service should be withdrawn. It thereupon withdrew the stock ticker service and instructed its member firms having temporarily approved private wire connections with Municipal, Inc. to discontinue such wire connections, which they did shortly thereafter.

The Exchange did not know and had no way of knowing that Municipal, Inc. wanted the private wires with member firms for any other purpose than that specified, to wit, for obtaining quotations of listed securities. While we are aware that private wires may be used to effect transactions in unlisted securities, more than half of the 5,600 non-member securities dealers in North America and at least 33 of the 56 non-member firms in Dallas do not have private wire connections with member firms. Apparently they transact their business in unlisted securities either through private wires with other non-member firms or

in some other way. Municipal admittedly had more private wires^o with non-members than with member firms and Municipal, Inc. represented in its application to the Exchange that it wished to obtain quotations of listed securities.

[fol. 269] In opposing plaintiffs' motion for summary judgment, Mr. Frank J. Coyle, a vice president of the Exchange, stated, as he then believed to be the fact, that "the member firms having unapproved private wire connections with Municipal were requested to discontinue them." In its motion for reargument, which was denied, the Exchange pointed out that that statement was in error, that the only letters of discontinuance sent by the Exchange were limited solely to Municipal, Inc., that the employees of the Exchange had no recollection of any communications with respect to Municipal's private wires, and that the Exchange did not even know of the existence of Municipal—to say nothing of its private wire connections with member firms—until after the action was brought. The erroneous statement had been due to the similarity in the names of Municipal Securities Company and Municipal Securities Company, Inc.

Plaintiffs' Motion for Partial Summary Judgement

On April 26, 1960, plaintiffs moved "for partial summary judgment under Section 16 of the Clayton Act" permanently enjoining and restraining defendant from interfering with the operation of plaintiffs' private wire connections with member firms and from refusing to furnish Municipal, Inc. with the stock ticker service "on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment on the first cause of action set forth in their complaint * * * except with respect to the amount of damages." Municipal also moved for a preliminary injunction pursuant to Rule 65(a). Neither moved for other than injunctive relief. Plaintiffs also requested [fol. 270] "such other, further, or different relief as may seem just and proper" but only "In the event that the aforesaid motion for partial summary judgment is denied." While the memoranda submitted in support of the motions

argued that Municipal, Inc. was entitled to a judgment as to liability under Section 4 of the Clayton Act, even plaintiffs recognized that Municipal was not entitled to such judgment as it had made no showing of actual damages.

The Decision of the District Court

On June 16, 1961, Judge Bryan filed his written opinion (copy of which is annexed hereto as Exhibit A). Judge Bryan concluded that the conduct of the Exchange and its member firms in the severance of the private wire connections with the plaintiffs constituted a concerted refusal to deal in violation of Section 1 of the Sherman Act and was illegal per se, and that plaintiffs are entitled to judgment against the Exchange for treble damages, costs and attorneys fees, and to a decree permanently enjoining the Exchange from preventing, prohibiting or interfering with the establishment, maintenance and operation of private wire connections between its member firms and plaintiffs. Judge Bryan also denied Municipal, Inc.'s motion for partial summary judgment based on the withdrawal of the stock ticker service.

The order of Judge Bryan (a certified copy of which is annexed hereto as Exhibit B) was entered on August 3, 1961 and grants plaintiffs' motions for summary judgment as to the liability of the Exchange under Section 4 of the Clayton Act, 15 U.S.C. §15, and for permanent injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. §26. The limitation in the injunctive provision with respect to [fol. 271] "trading or otherwise dealing, or communicating with respect to transactions, in over-the-counter securities, municipal bonds, or securities not listed for trading on the New York Stock Exchange" was made at plaintiffs' request. The order also states that "In accordance with 28 U.S.C. §1292(b) the Court is of the opinion that the issue as to the liability of defendant * * * involve controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal therefrom may materially advance the ultimate termination of the litigation."

Conclusion

It is respectfully submitted that, for the reasons more fully set forth in the memorandum submitted herewith, an order should be made permitting the Exchange to appeal from that part of Judge Bryan's order granting plaintiffs' motion as to the liability of the Exchange under Section 4 of the Clayton Act, 15 U.S.C. §15.

Edward J. Reilly, Jr.

Sworn to before me this 4th day of August, 1961.

Louis A. Wolf, Notary Public, State of New York, No. 30-9723500, Qualified in Nassau County, Certificate filed in New York County, Term Expires March 30, 1962.

[fol. 272]

EXHIBIT A TO AFFIDAVIT OF EDWARD J. REILLY, JR.

Opinion of Judge Bryan, June 16, 1961 Omitted. Printed side folio 218, page 203 ante.

[fol. 291]

EXHIBIT B TO AFFIDAVIT OF EDWARD J. REILLY, JR.

Order of Judge Bryan, August 2, 1961 Omitted. Printed side folio 258, page 239 ante.

[fol. 295]

IN UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY,
and MUNICIPAL SECURITIES COMPANY, INC., Plaintiffs-
Appellees,

v.

NEW YORK STOCK EXCHANGE, Defendant-Appellant.

ORDER DENYING PETITION FOR LEAVE TO APPEAL UNDER
SECTION 1292(b) OF TITLE 28 U.S.C. AND RULE 10(d)
OF THE RULES OF THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT—September 19, 1961

Dickstein, Shapiro & Galligan, New York, N. Y., for
respondents.

Milbank, Tweed, Hope & Hadley, New York, N. Y., for
petitioner.

Judges Lumbard, Moore and Friendly having voted to
grant the application, and Judges Clark, Waterman and
Smith having voted to deny, the application is denied
for lack of a majority in favor of the application.

J. Edward Lumbard, Chief Judge.

19 September 1961.

[fol. 296]

[File endorsement omitted]

[fol. 297]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Title omitted]

ORDER DENYING MOTION FOR LEAVE TO APPEAL—
September 19, 1961

A motion having been made herein by counsel for the petitioners for leave to appeal,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 298]

[File endorsement omitted]

[fol. 299]

MOTION OF THE SECURITIES AND EXCHANGE COMMISSION
FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE HEREIN
(omitted in printing)

[fol. 303]

[Stamp—United States Court of Appeals, Second Circuit,
Filed December 4, 1961, A. Daniel Fusaro, Clerk.]

[fol. 304]

ORDER GRANTING LEAVE TO FILE BRIEF AMICUS CURIAE
(omitted in printing)

[fol. 306]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY,
and MUNICIPAL SECURITIES COMPANY, INC., Plaintiffs-
Appellees,

—against—

NEW YORK STOCK EXCHANGE, Defendant-Appellant.

STIPULATION AS TO SUBSTITUTION OF PARTIES FILED DECEMBER 1, 1961 AND ORDER OF DECEMBER 4, 1961 GRANTING SAME

It Is Hereby Stipulated and Agreed by and between the attorneys for the parties hereto that Evelyn B. Silver, who has qualified as executrix of the estate of Harold J. Silver, deceased, pursuant to the order of the Probate Court of Dallas County, Texas, on October 30, 1961, be and hereby is substituted in the place and stead of Harold J. Silver in the within action pursuant to Rule 9 of the Rules of this Court and Rule 25 of the Federal Rules of Civil Procedure.

Dated: New York, N. Y., December 1, 1961.

Dickstein, Shapiro & Galligan, Attorneys for Plaintiffs-Appellees.

Milbank, Tweed, Hope & Hadley, Attorneys for Defendant-Appellant.

So Ordered: December 4, 1961.

A. Daniel Fusaro, Clerk.

[fol. 307]

[File endorsement omitted]

[fol. 315]

[Stamp—United States Court of Appeals, Second Circuit.
Filed January 3, 1962, A. Daniel Fusaro, Clerk.]

[fol. 316]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 27211

[Title omitted]

NOTICE OF MOTION FOR HEARING EN BANC—

Filed January 5, 1962

Sirs:

Please Take Notice that upon the annexed affidavit of Sidney Dickstein, sworn to the 27th day of December, 1961, the undersigned will move this Court for an order pursuant to the provisions of Section 46(c) of Title 28, United States Code providing that the appeal herein be heard and decided by this Court *en banc*.

Please Take Further Notice that this motion will be submitted for the Court's consideration without oral argument, at the office of the Clerk of the United States Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, County and City of New York, on the 2nd day of January, 1962 at 10:30 in the forenoon thereof.

Yours, etc.

Dickstein, Shapiro & Galligan, By Sidney Dickstein,
A Member of the Firm, Attorneys for Plaintiffs-
Appellees, 20 East 46th Street, New York 17,
New York.

To: Milbank, Tweed, Hope & Hadley, Esqs., Attorneys
for Defendant-Appellant, 1 Chase Manhattan Plaza, New
York 5, New York.

[fol. 317]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 27211

[Title omitted]

AFFIDAVIT OF SIDNEY DICKSTEIN

State of New York,
County of New York, ss.:

Sidney Dickstein, being duly sworn, deposes and says:

I am an attorney at law duly admitted to practice before this Court and a member of the firm of Dickstein, Shapiro & Galligan, attorneys for the plaintiffs-appellees herein. I make this affidavit in support of this motion for an *en banc* hearing and determination of the instant appeal.

The opinion of the court below is reported at 196 F. Supp. 209 and is set forth in full at pages 126-166 of the Appendix of Defendant-Appellant. As reflected by the district court's opinion, it is your deponent's view that the instant appeal involves important issues of law. The Securities and Exchange Commission has evidenced its interest in this appeal by the submission of a brief, *amicus curiae*, and an application for leave to participate in oral argument (consideration of which has been deferred to the members of this Court who will be designated to hear the appeal).

[fol. 318] Plaintiffs-appellees have moved for an order advancing the hearing on this appeal to a date prior to January 15, 1962 and this motion should be considered in conjunction with the motion for advancement. If, however, this Court, in its discretion, should desire to hear the appeal *en banc*, but cannot do so prior to January 15, 1962, counsel will be prepared to argue the appeal at any date consistent to this Court's convenience.

Wherefore your deponent respectfully prays that this Court in the exercise of its discretion order the instant

appeal to be heard and determined before the Court, *en banc*.

Sidney Dickstein.

Sworn to before me this 27th day of December, 1961.

Arthur J. Galligan, Notary Public, State of New York.
No. 31-1364450, Qualified in New York County, Commission
Expires March 30, 1963.

[fol. 319] [File endorsement omitted]

[fol. 320]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY,
and MUNICIPAL SECURITIES COMPANY, INC., Plaintiffs-
Appellees,

v.

NEW YORK STOCK EXCHANGE, Defendant-Appellant.

ORDER DENYING MOTION TO HAVE APPEAL HEARD IN BANC—
January 5, 1962

Dickstein, Shapiro & Galligan, New York, N. Y., for
Plaintiffs-Appellees.

All of the active judges concurring, the motion is denied.

J. Edward Lombard, Chief Judge.

5 January 1962.

[fol. 321] [File endorsement omitted]

[fol. 322]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Title omitted]

ORDER DENYING MOTION FOR HEARING IN BANC—
January 5, 1962

A motion having been made herein by counsel for the
appellees to have the argument of the appeal heard en banc.

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 323]

[File endorsement omitted]

[fol. 324]

MOTION OF THE SECURITIES AND EXCHANGE COMMISSION,
AMICUS CURIAE, FOR LEAVE TO PARTICIPATE IN ORAL
ARGUMENT

(omitted in printing)

[fol. 327]

ORDER GRANTING LEAVE TO ARGUE AS AMICUS CURIAE

(omitted in printing)

[fol. 329]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 208—September Term, 1961.

Argued February 7, 1962

Docket No. 27211

HAROLD J. SILVER, doing business as Municipal Securities Company, and MUNICIPAL SECURITIES COMPANY, INC.,
Plaintiffs-Appellees,

—v.—

NEW YORK STOCK EXCHANGE, Defendant-Appellant.

Before: LUMBARD, Chief Judge, WATERMAN and HAYS,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Frederick vP. Bryan, Judge, granting plaintiffs' motion for summary judgment permanently enjoining defendant under Section 16 of the Clayton Act from interfering with private wire and telemeter connections between its members and plaintiffs.

Reversed and remanded for further proceedings.

DAVID I. SHAPIRO, of Dickstein, Shapiro and Galligan, New York, N. Y. (Goldberg, Fonville, Gump and Strauss, Dallas, Texas, on the brief), for plaintiffs-appellees.

[fol. 330] A. DONALD MACKINNON, of Milbank, Tweed, Hope and Hadley, New York, N. Y. (Edward J. Reilly, Jr., Squire N. Bozorth, on the brief), for defendant-appellant.

PETER A. DAMMANN, General Counsel, Securities and Exchange Commission, Washington, D. C. (David Ferber, Associate General Counsel, Walter P. North, Assistant General Counsel, Faith Colish, Attorney, on the brief), for the Securities and Exchange Commission, amicus curiae.

OPINION—April 6, 1962

HAYS, Circuit Judge:

This is an action for damages and injunctive relief brought under Sections 4 and 16 of the Clayton Act. The principal issue is whether defendant by instructing its members to deny private wire service to the plaintiffs engaged in an activity prohibited by Section 1 of the Sherman Act. The lower court, granting plaintiff's motion for summary judgment, held that defendant's action constituted a concerted refusal to deal which was *per se* unlawful, and gave plaintiff a permanent injunction. 196 F. Supp. 209 (S. D. N. Y. 1961). This is the order from which the present appeal is taken. We reverse on the ground that the defendant acted in pursuance of powers granted to it by the Securities Exchange Act of 1934.

The plaintiffs, Municipal Securities and Municipal Securities, Inc. are engaged in the securities business in Dallas, Texas. Municipal Securities deals almost exclusively in municipal bonds, Municipal Securities, Inc. in over-the-counter corporate securities. They are not members of the New York Stock Exchange. Harold J. Silver was, until his death, sole proprietor of Municipal Securities. He and his [fol. 331] wife were the principal officers and directors of Municipal Securities, Inc.

In June, 1958, Municipal Securities, Inc. applied to the New York Stock Exchange for approval of private wire connections¹ with several officers of firms which were members of the Exchange.² The Exchange gave "temporary approval" to the proposed arrangement and the connections were installed.

Following its usual practice in such cases the Exchange ordered an investigation of Municipal Securities, Inc. and its officers. The investigation revealed several matters

¹ Private wires, as used here, means direct telephone and teletype connections.

² Municipal Securities, without applying for such approval, had at an earlier date established private wire connections with other member firms.

which appeared to the Exchange to have a bearing on whether approval of the application of Municipal Securities, Inc. should be made permanent. According to the Exchange, plaintiff Silver, in providing the information requested by the Exchange in connection with his application, had failed to list two corporations with which he and his wife had been connected, the Defense Department had suspended the security clearance of Silver and his wife and of another corporation in which the Silvers held a major interest, the Silvers had "apparently" breached an agreement involving the exchange of certain shares of stock, and there were "further disclosures of a derogatory nature."

On February 12, 1959, relying upon the results of its investigation and without notice to Municipal Securities, Inc., the Exchange "requested" its members to discontinue the private wire connections with Municipal Securities, Inc. They did so.

[fol. 332] The results of the investigation were disclosed only in the course of the proceedings in the lower court, and, then, according to the Exchange, only in part. Silver's attempts to learn from the Exchange the reasons for the cancellation of the wire services were unavailing. He was informed that the practice of the Exchange did not permit the disclosure of this information.

The lower court held that the action of the Exchange and its members constituted a concerted refusal to deal which violated Section 1 of the Sherman Act and was illegal *per se*.

It is quite clear that there would be, at the very least, a grave doubt as to the legality of the action of the defendant if it is not insulated from liability under the Sherman Act for such action by reason of the duties and obligations imposed upon it by the Securities Exchange Act of 1934. We hold, however, that the action of the Exchange in bringing about the cancellation of the private wire connections with members of the Exchange was within the general scope of the authority of the Exchange as defined by the 1934^o Act and therefore outside the coverage of the Sherman Act.

The broad scope of the Securities Exchange Act is indicated by Section 2, Necessity for Regulation, which reads in part as follows:

"transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, * * * and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, [fol. 333] to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions."

The basic scheme of the Act contemplates that control over the conduct of members of securities exchanges will be shared by the Securities and Exchange Commission and the securities exchanges themselves, with the Commission exercising general supervisory power over the exchanges' self-regulation. The report on stock exchange regulation by the so-called Dickinson Committee which, at the request of the President and in collaboration with the Senate Committee on Banking and Currency, formulated the fundamental plan for the legislation in this field, stated:

"It is not proposed that the Government so dominate exchanges as to deprive these organizations of initiative and responsibility * * * [We propose the formation of] a Government agency operating in this field, and endowed with wide powers to license or close exchanges, coupled with the reserve power to license individual brokers * * *, and to make rules and regulations concerning a delicate mechanism like the stock exchange [which] must be * * * so constituted as to place responsibility to the fullest extent possible on the private bodies now handling the work of security exchanges."

"[I]t seems distinctly better, in the opinion of your committee, to stimulate the exchange to further disciplinary activity by holding it to a high degree of accountability for the conduct of [its] members."³

[fol. 334] The House Committee Report on the bill which became the 1934 Act said:

"It is hoped that the effect of the bill will be to give to the well-managed exchanges that power necessary to enable them to effect themselves needed reforms and that the occasion for direct action by the Commission will not arise."⁴

The Senate Committee Report said:

"Thus the initiative and responsibility for promulgating regulations pertaining to the administration of their ordinary affairs remain with the exchanges themselves. It is only where they fail adequately to provide protection to investors that the Commission is authorized to step in and compel them to do so."⁵

The structure of the Act bears out this purpose. Section 6(a) requires an exchange upon registering with the Commission to file a registration statement containing "an agreement . . . to comply, and to enforce so far as it is within its powers compliance by its members, with the provisions of" the Act and the Commission's rules and regulations thereunder. Section 6(a)(3) requires the filing with the Commission of copies of the constitution of the Exchange, and its rules. The Exchange must provide "an agreement to furnish to the Commission copies of any

³ Stock Exchange Regulation—Letter of Transmittal from the President of the United States to the Chairman of the Committee on Banking and Currency with an Accompanying Report Relative to Stock Exchange Regulation, Senate Committee Print, 73rd Cong., 2d Sess. (1934) pp. 6, 7, 8.

⁴ H. R. Rep. No. 1383, 73rd Cong., 2d Sess. 15 (1934).

⁵ S. Rep. No. 792, 73rd Cong., 2d Sess. 13 (1934).

amendments to the rules of the Exchange forthwith upon their adoption." (Section 6(a)(4).) The rules of the Exchange must "include provision for the expulsion, suspension [fol. 335] or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade," and must be "just and adequate to insure fair dealing and protect investors." (Section 6(d).)

Under Section 19 the Commission is authorized "if in its opinion such action is necessary or appropriate for the protection of investors—

"(1) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange if the Commission finds that such exchange has violated any provision of this chapter or of the rules and regulations thereunder or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon."

Section 19(b) provides:

"The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial [fol. 336] responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any se-

curity within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters."

In accordance with the requirements of the Act, the constitution and rules of the defendant New York Stock Exchange were filed with the Commission. Article III, Section 6, of the constitution provides that the Board of Governors of the Exchange "shall have supervision over all matters relating to the collection, dissemination and use of quotations and of reports of prices on the Exchange and shall have the power to approve or disapprove any application for ticker service to any non-member, or for wire, wireless, or other connection between any office of any member of the Exchange, member firm or member corporation and any non-member, and may require the discontinuance of any such service or connection."

[fol. 337] Rules 355 and 356 as they read in 1958 provided:

"Rule 355. (a) No member or member organization shall establish or maintain any wire connection, private radio, television or wireless system between his or its offices and the office of any non-member, or permit any private radio or television system between his or its offices, without prior consent of the Exchange.

(b) Every non-member will be required to execute a private wire contract in form prescribed by the

Exchange to be filed with it, unless a contract is already on file with the Exchange.

(c) Notification regarding a private means of communication with a non-member and the signed contract when necessary shall be submitted to the Department of Member Firms. This notification, by a member or allied member, may be in form supplied by the Exchange or in letter form, and shall include the essential facts concerning the non-member and the means of communication.

(d) Each member or member organization shall submit annually to the Department of Member Firms a list of all non-members with whom private means of communication are maintained.

(e) The Exchange may require at any time that any means of communication be discontinued.

Rule 356. The Exchange may require at any time the discontinuance of any means of communication whatsoever which has a terminus in the office of a member or member organization. * * *

As Judge Clark said in *Baird v. Franklin*, 141 F. 2d 238, 244 (2d Cir.), cert. denied, 323 U. S. 737 (1944), the Act [fol. 338] makes it the duty of the Exchange to enforce the rules which it is required to file with the Commission.

"There can be no doubt that §6(b) places a duty upon the Stock Exchange to enforce the rules and regulations prescribed by that section. Any other construction would render the provision meaningless. Defendant's argument that the Securities Exchange Act did not alter the prior status of the Stock Exchange Rules as by-laws of a private club is untenable. If all that §6(b) meant was that every exchange should pass token regulations, incapable of enforcement except at the wish of the exchange itself, there would have been no purpose for its inclusion in the Act. Sections 6(b) and (d) were surely intended to be read together, and the latter makes it clear that the pur-

pose of the requirements of the former is 'to insure fair dealing and to protect investors.' This can be realized only if §6(b) is construed as imposing the two-fold duty upon an exchange of enacting certain rules and regulations and of seeing that they are enforced."⁶

See also 2 Loss, Securities Regulation 1178 (1961)..

To summarize: The structure of the Securities Exchange Act of 1934 and its legislative history disclose that the Act was designed to require that the Securities and Exchange Commission share with the exchanges themselves the governance of those matters which the Act regulates. The constitution and rules of the New York Stock Exchange are filed with the Commission. It is reasonably to be presumed that those regulations have the approval of the Commission since it has not taken the action which it [fol. 339] is empowered by the statute to take to bring about their amendment. The Exchange is required by virtue of the statute to enforce its rules. As long as the Exchange acts within the scope of its statutory authority in the enforcement of its rules its action cannot be condemned as within the prohibitions of the Sherman Act.

But, it is argued, and the lower court held, that the Exchange exceeded its authority in the present case in acting with respect to dealings in over-the-counter securities. It may be, it is said, that the Exchange is free from the restrictions of the anti-trust laws so long as it confines its activity to matters which relate to securities which are listed on the Exchange; but when it goes beyond these limits and purports to exercise authority over dealers in the over-the-counter market it subjects itself to a charge of violation of the Sherman Act.

There is no justification in the Securities Act for drawing a distinction between the control which the Exchange is called upon to exercise over its members when they are dealing with listed securities and when they are dealing with other securities. On the contrary there are a number

⁶ While Judge Clark dissented on another issue, his statement on this point reflected the view of the Court.

of references in the Act to activities connected with unlisted securities or with "any" securities (see e.g. Section 7(c)(2), Section 8(c), Section 10(b)).

The Commission urges that this case be determined "without casting any doubt upon the right and duty of registered stock exchanges to discipline their members who are engaged in practices contrary to just and equitable principles of trade, including violations of the Securities Exchange Act of 1934, and the Commission's rules thereunder, regardless of whether such practices relate to listed or unlisted securities, and whether a non-member may be indirectly adversely affected." The Commission has long [fol. 340] recognized that what a member of an exchange does as an over-the-counter dealer has an important connection with his membership in the Exchange. In a number of cases members have been expelled or suspended from membership on securities exchanges as a penalty for derelictions in their over-the-counter business. See e.g. *Walston and Co.*, 7 S. E. C. 937 (1940), modified 9 S. E. C. 660 (1941), petition for review dismissed, 121 F. 2d 1019 (9th Cir. 1941); *W. K. Archer & Co.*, 11 S. E. C. 635 (1942), aff'd, 133 F. 2d 795 (9th Cir. 1943); *Robert DeForest Boomer*, 13 S. E. C. 102 (1943); *Mason, Moran & Co.*, 35 S. E. C. 84 (1953); *R. L. Emacio & Co.*, 35 S. E. C. 191 (1953).

The New York Stock Exchange is performing a vital public function. Its standing and reputation are important to the national economy.

"The bill proceeds on the theory that the exchanges are public institutions," said the House Committee Report⁸ referring to the bill which later became the Securities Exchange Act of 1934.

Mr. Justice Douglas, when he was Chairman of the Securities and Exchange Commission, said:

"I have always regarded the exchanges as the scales upon which that great national resource, invested

⁸ Brief of Securities and Exchange Commission, *amicus curiae*, p. 14.

⁹ H. R. Rep. No. 1383, 73rd Cong., 2d Sess. 15 (1934).

capital, is weighed and evaluated. Scales of such importance must be tamper-proof, with no concealed springs—and there must be no laying on of hands. . . . Such an important instrument in our economic welfare . . . must be surrounded by adequate safeguards.”⁹

[fol. 341] It is highly important for the proper operation of the Exchange as a public institution that its membership and procedures continue to enjoy the confidence of investors. The reputation of the Exchange is a valuable asset from the public point of view. The Exchange must have sufficient power of discipline over its members to enable it to enforce the high standards of conduct which the Act contemplates. If it is to have the requisite power it cannot be hamstrung by an unjustifiable limitation based upon whether its members are at the moment dealing in listed or in unlisted securities.

We conclude that the statute gives the Commission and the Exchange disciplinary powers over members of the Exchange with respect to their transactions in over-the-counter securities, and that the policy of the statute requires that the Exchange exercise these powers fully. In the exercise of such powers the Exchange is not subject to the restrictions of the Sherman Act.

The next question presented is whether this immunity applies regardless of the correctness or, indeed, reasonableness of a particular decision. Does a securities exchange, while acting within the general scope of its authority to discipline its members, fall into the ambit of the Sherman Act when a particular decision is arbitrary or unreasonable? To find that the Sherman Act applies in such a situation would go far toward defeating the statutory policy of self-regulation. If securities exchanges were in constant danger of subjecting themselves to liability under the anti-trust laws for any misapplication of their disciplinary powers, they would understandably be reluctant to fulfill their obligations under the Securities

⁹ Douglas, *Democracy and Finance* (1940) 64, 65.

Exchange Act. Cf. *Booth v. Fletcher*, 101 F. 2d 676, 680 (D. C. Cir. 1938), cert. denied, 307 U. S. 628 (1939). When the exchanges are acting other than in "the clear absence [fol. 342] of all jurisdiction over the subject matter," *Bradley v. Fisher*, 80 U. S. 335, 351 (1871), they are secure from such liability to a person aggrieved by their action. In the exercise of the powers which they are required by the statute to exercise the exchanges must be immune from prosecution under other legislation. Cf. *Gregoire v. Biddle*, 177 F. 2d 579 (2d Cir. 1949), cert. denied, 339 U. S. 949 (1950).

What has been said does not mean that if the action of the Exchange was arbitrary or unreasonable appellees are without a remedy. The Exchange is exempt from the restrictions of the Sherman Act because it is exercising a power which it is required to exercise by the Securities Exchange Act. The availability of judicial review is a necessary concomitant of the exercise of such power. See *Steele v. Louisville & Nashville Railroad Company*, 323 U. S. 192 (1944); *Conley v. Gibson*, 355 U. S. 41 (1957); Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 401, 769, 800-808 (1958). Compare Administrative Procedure Act §10a, 5 U. S. C. §1009(a) (1958). That the statute is silent on the question of judicial review is, of course, not decisive. *Estep v. United States*, 327 U. S. 114, 120 (1946).

The lower court, examining the situation for possible application to it of the "rule of reason" under the Sherman Act, found that the Exchange had acted "arbitrarily and unreasonably in directing that plaintiff's wire connections be severed." 196 F. Supp. at 227. Whatever conclusion one might reach on this issue, the procedure of the Exchange in failing to give prior notice of its action and in refusing to inform Silver of the charges made against him and to give him an opportunity to rebut these charges may well be characterized as arbitrary.

The question therefore arises as to whether the judgment below should be affirmed because an injunction might [fol. 343] have been available to the plaintiff had the suit sought relief from the Exchange's arbitrary action rather than the remedies provided by the Clayton Act. This is not,

however, a case for the application of the accepted rule that a judgment which grants an appropriate remedy will not be reversed merely because the correct result was reached on an erroneous theory. See Fed. Rules Civ. Proc. 54(c); *Mackintosh v. Estate of Marks*, 225 F. 2d 214 (5th Cir. 1955); *Psinakis v. Psinakis*, 221 F. 2d 418, 423 (3rd Cir. 1955); *Shelley v. Union Oil Co.*, 203 F. 2d 808 (9th Cir. 1953). In this case we cannot be certain that, if the plaintiff had not proceeded under the Sherman Act, the parties would not have treated the controversy quite differently. The plaintiff, for example, might even have sought another remedy. The Exchange might have determined to grant the plaintiff an opportunity to rebut the charges made against him. Had the district court been guided by the principles set forth in this opinion, it might have chosen to hold a hearing and to hear witnesses instead of deciding the issues by summary action and injunction.

We therefore reverse and remand to give the parties and the district court an opportunity to reconsider the case in the light of our opinion.

WATERMAN, Circuit Judge (dissenting):

I dissent. I would affirm on the opinion of Judge Bryan below, reported at 196 F. Supp. 209 (S. D. N. Y. 1961).

[fol. 344]

WATERMAN, Circuit Judge (dissenting):

The majority opinion gives the appellant a significant privilege to which I believe no statute entitles it. Moreover, without mentioning that they have done so, the majority have apparently discredited that portion of the landmark decision of Judge Medina in *United States v. Morgan*, 118 F. Supp. 621 at 697 (S. D. N. Y. 1953), in which he discussed the statutory scheme of the Securities Acts of 1933 and 1934 and stated that those acts do not create any implied exemptions from the Sherman Act.

In other provisions of the Securities Exchange Act, namely those sections governing over-the-counter brokers'

and dealers' associations, 52 Stat. 1070 (1938), 15 U. S. C. §780-3 (1958), the draftsmen of our securities statutes provided an explicit exemption from the antitrust laws. 15 U. S. C. §780-3(n) (1958). The presence of explicit exemptions in certain parts of a statute should make us hesitate to find a congressional intention to create implicit exemptions elsewhere in the same legislation.

In *United States v. Borden Co.*, 308 U. S. 188 (1939), involving the scope of the Agricultural Marketing Agreement Act, 7 U. S. C. §§601-59 (1958), it was argued that by the passage of that regulatory legislation Congress had created an implied exemption from the antitrust laws. The Supreme Court rejected the argument, stating, at pp. 197-198:

In the opinion of the court below, the existence of the authority vested in the Secretary of Agriculture, although unexercised, wholly destroys the operation of Section 1 of the Sherman Act with respect to the marketing of agricultural commodities.

We are of the opinion that this conclusion is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given, as [fol. 345] we shall see, to agreements and orders which may validly be made by the Secretary of Agriculture, there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Anti-Trust Act and is left open to the restraints, however unreasonable, which conspiring producers, distributors and their allies may see fit to impose. We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan. We cannot believe that Congress intended to create "so great a breach in historic remedies and sanctions."

It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible.

As a further reason for not reading in any implied exemption in that statute the court also pointed out, at 200-01, that the Agricultural Marketing Act provided explicit exemptions to the antitrust laws in those areas where that was the congressional intention. And in *Georgia v. Pennsylvania R.R. Co.*, 324 U. S. 439 (1945), the Court stated, at pp. 456-57:

These carriers are subject to the anti-trust laws. *United States v. Southern Pacific Co.*, 259 U. S. 214. Conspiracies among carriers to fix rates were included in the broad sweep of the Sherman Act. *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States v. Joint Traffic Assn.*, 171 U. S. 505. Congress by §11 of the Clayton Act entrusted the Commission with authority to enforce compliance with certain of [fol. 346] its provisions "where applicable to common carriers" under the Commission's jurisdiction. It has the power to lift the ban of the anti-trust laws in favor of carriers who merge or consolidate (*New York Central Securities Corp. v. United States*, 287 U. S. 12, 25-26) and the duty to give weight to the anti-trust policy of the nation before approving mergers and consolidations. *McLean Trucking Co. v. United States*, 321 U. S. 67. But Congress has not given the Commission comparable authority to remove rate-fixing combinations from the prohibitions contained in the anti-trust laws. It has not placed these combinations under the control and supervision of the Commission. Nor has it empowered the Commission to proceed against such combinations and through cease and desist orders or otherwise to put an end to their activities. Regulated industries are not *per se* exempt from the Sherman Act. *United States v. Borden Co.*, 308 U. S. 188, 198 *et seq.* It is true that the Commission's regulation of carriers has greatly expanded since the Sherman Act. See *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 385-386. But it is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to

the extent of the repugnancy. *United States v. Borden*, *supra*, pp. 198, 199. None of the powers acquired by the Commission since the enactment of the Sherman Act relates to the regulation of rate-fixing combinations. Twice Congress has been tendered proposals to legalize rate-fixing combinations. But it has not adopted them. In view of this history we can only conclude that they have no immunity from the antitrust laws.

[fol. 347] I believe with Judge Bryan that, as applied to the facts in this case, there is no clear repugnancy between the Securities Exchange Act of 1934 and the Sherman Act, which requires the blanket exemption from the antitrust law which the majority here finds.

The majority believes that it can leave enforcement of the antitrust laws in the hands of the Securities and Exchange Commission despite the fact that that agency's expertise does not involve matters of antitrust law, and it does not appear that Congress intended that the Commission was to be an overseer of the antitrust laws. I do not subscribe to that belief.

[fol. 348]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon.
Sterry R. Waterman, Hon. Paul R. Hays, Circuit Judges.

EVELYN B. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY,
and MUNICIPAL SECURITIES COMPANY, INC., Plaintiffs-
Appellees,

v.

NEW YORK STOCK EXCHANGE, Defendant-Appellant.

JUDGMENT—April 6, 1962

Appeal from the United States District Court for the
Southern District of New York.

This cause came on to be heard on the transcript of record
from the United States District Court for the Southern
District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered,
adjudged, and decreed that the order of said District Court
be and it hereby is reversed and that the action be and it
hereby is remanded for further proceedings in accordance
with the opinion of this court; with costs to the appellant.

A. DANIEL FUSARO, Clerk.

[fol. 349] [File endorsement omitted]

[fol. 350] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 351]

SUPREME COURT OF THE UNITED STATES

No. 150—October Term, 1962

HAROLD J. SILVER, d/b/a
MUNICIPAL SECURITIES COMPANY, et al., Petitioners,

vs.

NEW YORK STOCK EXCHANGE.

ORDER ALLOWING CERTIORARI—October 8, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

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IN THE
Supreme Court of the United States

October Term, 1961

No. **150**

**HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES
COMPANY AND MUNICIPAL SECURITIES COM-
PANY, INC.,**

Petitioners,

v.

NEW YORK STOCK EXCHANGE,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

DAVID I. SHAPIRO,
1411 K Street, N. W.,
Washington 5, D. C.,
Attorney for Petitioners.

DICKSTEIN, SHAPIRO & GALLIGAN,
20 East 46th Street,
New York 17, New York.

GOLDBERG, FONVILLE, GUMP & STRAUSS,
2232 Republic National Bank Building,
Dallas 1, Texas,
of Counsel.

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IN THE
Supreme Court of the United States

October Term, 1961

No.

**HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY
and MUNICIPAL SECURITIES COMPANY, INC.,**
Petitioners,

v.

NEW YORK STOCK EXCHANGE,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

*To The Honorable Chief Justice of the United States and
the Associate Justices of the Supreme Court of the
United States;*

Harold J. Silver, d/b/a Municipal Securities Company,¹
and Municipal Securities Company, Inc., petitioners herein,
pray that a writ of certiorari issue to the United States
Court of Appeals for the Second Circuit to review the
judgment of that court entered April 6, 1962, which reversed
the action of the District Court granting petitioners' motion
for summary judgment permanently enjoining respondent
from interfering with private wire and telemeter connec-
tions between its members and petitioners.

¹ Harold J. Silver died on October 2, 1961. By order dated
December 4, 1961, Evelyn B. Silver, as executrix of the estate of
Harold J. Silver, was substituted as a plaintiff-appellee below (R.
306).

Opinions Below

The opinion of the Court of Appeals has not been officially reported, but is set out in Appendix A, *infra*, at pages 18-35. The opinion of the District Court is reported at 196 F. Supp. 209 (S. D. N. Y., 1961) and is set out at pages 126-166 of the appendix as printed for the use of the Court below.²

Jurisdiction

The judgment of the court below was entered April 6, 1962 (R. 344). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Statement of Questions Presented

1. Do the provisions of Section 6 and 19(b) of the Securities Exchange Act of 1934, 48 Stat. 885, 889, 15 U. S. C. §§ 78f and 78s(b), immunize from the antitrust laws those provisions of the constitution and rules of a registered securities exchange by which said exchange is authorized to and does arbitrarily restrain the exercise of a member firm's freedom to establish and maintain private wire connections with non-members for the purpose of trading and communicating with respect to transactions in securities not listed for trading on said exchange?

2. Do the provisions of Section 6 of the Securities Exchange Act of 1934, 48 Stat. 885, 15 U. S. C. § 78f, which require a securities exchange to make and enforce rules against members who engage in conduct inconsistent with just and equitable principles of trade and willful violation of provisions of the Securities Exchange Act, immunize

² In the court below, respondent's appendix was numbered 1-169 and petitioners' appendix was numbered 171-263. These appendices are now combined and hereinafter shall be referred to as "J.A.", i.e., joint appendix.

from the antitrust laws exchange action not directed against derelictions of members, but against non-member over-the-counter securities dealers who maintain private wire connections with members?

3. Assuming, *arguendo*, that a registered securities exchange is immune from the antitrust laws for action taken in accordance with its rules filed under Section 6 of the Securities Exchange Act of 1934, does such immunity extend to arbitrary or unreasonable exchange action requiring exchange members to cease maintaining private wire connections with non-member over-the-counter securities dealers?

Statutory Provisions Involved

The statutes involved are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1 and 2; Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. § 26; and Sections 6 and 19(b) of the Securities Exchange Act of 1934, 48 Stat. 885, 898, 15 U. S. C. §§ 78f and 78s(b).

The pertinent portions of these statutes are set forth in Appendix B, *infra*, at pages 36-39.

Statement of the Case

The District Court made extensive findings with respect to those facts about which no genuine dispute existed (J.A. 128-136, 155-159). These findings were left undisturbed by the Court of Appeals (Appendix A, *infra*, pp. 19-32).

A. Parties and Cause of Action.

Petitioner Municipal Securities Company (hereinafter referred to as "MSC") is a sole proprietorship engaged in the securities business. Virtually all of its activities are concerned with municipal bond transactions. Petitioner Municipal Securities Company, Inc. (hereinafter referred

to as "MSC, INC."), a corporation organized under the laws of the state of Texas, is also engaged in the securities business, principally in over-the-counter securities. (J.A. 128). Petitioners MSC and MSC, Inc. are licensed as securities dealers under the laws of the state of Texas and are registered as broker-dealers with the Securities and Exchange Commission (SEC). Both petitioners are members in good standing of the National Association of Securities Dealers (NASD) (J.A. 21, 24, 28).

Respondent New York Stock Exchange (hereinafter referred to as "NYSE" or the "Exchange") is an unincorporated association with an authorized membership of 1375. It provides facilities for its members and their firms to transact business in corporate securities listed for trading by the Exchange. While actual trading takes place on the exchange floor in New York, its members do business nationwide. It is the largest and most important of the national stock exchanges (J.A. 21, 67, 127).³

The complaint alleges, *inter alia*, a conspiracy between the NYSE and various of its member firms (named as co-conspirators, but not as parties) to deprive petitioners of private wire and telemeter connections with such member firms and of the NYSE's stock ticker service, all to petitioners' substantial competitive disadvantage in violation of the Sherman Act, 15 U. S. C. § 1, *et seq.* (J.A. 2, 127).

B. The Undisputed Material Facts.

Prior to February 12, 1959, petitioners had private wire connections with NYSE members firms which were used

³ The District Court found: "The [NYSE] lists select corporate securities which include those of many of the country's largest and most important corporations. It provides a quality market for its members to execute orders for the purchase and sale of securities so listed for their own accounts and for the accounts of customers" (J.A. 129).

to trade, and communicate with respect to transactions, in securities not listed for trading on the New York Stock Exchange (J.A. 30, 31, 47-48, 240). On February 12, 1959, without notice to petitioners, the NYSE instructed its member firms to discontinue these wires (J.A. 32, 62, 180). By March 2, 1959, all private wire connections between petitioners and NYSE member firms were discontinued (J.A. 34, 49-50, 65, 66-67). The District Court's "inescapable conclusion from what [was] relied on by the Exchange in justification [was] that [the Exchange] acted arbitrarily and unreasonably in directing that plaintiffs' wire connections be severed" (J.A. 159).⁴

C. Proceedings Below.

Petitioners commenced this action on April 3, 1959 by filing a complaint in the United States District Court for the Southern District of New York (J.A. 1). Jurisdiction was based on diversity of citizenship and the Federal anti-trust laws (J.A. 3). After answer (J.A. 14) and extensive discovery by both sides (J.A. 139), petitioners moved for partial summary judgment (J.A. 17). Petitioners' motion was granted on May 19, 1961 (J.A. 124) and, on June 18, 1961, the District Court filed a written opinion containing its findings of fact and conclusions of law (J.A. 126).

The District Judge held that (1) the Securities Exchange Act of 1934 "requiring an exchange to file its constitution and rules and to register are not a substitute for nor do they supersede the anti-trust laws" (J.A. 148); and (2) providing "that its members do not indulge in conduct which is illegal or inconsistent with just and equitable principles of trade, an exchange has neither the power

⁴ The Court of Appeals did not disturb this finding. It said: "Whatever conclusion one might reach on this issue, the procedure of the Exchange in failing to give prior notice of its action and in refusing to inform Silver of the charges made against him and to give him an opportunity to rebut these charges may well be characterized as arbitrary" (Appendix A, *infra*, p. 31).

nor the authority to determine with whom its members may or may not deal or to direct them to desist from dealing with non-member broker/dealers engaged in transactions in over-the-counter securities and municipals. If it does so it does so at its peril and is subject to such appropriate action as may be taken under the anti-trust laws" (J.A. 149-150).

On August 3, 1961, the District Court entered an order which, *inter alia*, permanently enjoined respondent under Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. § 26, "from preventing, prohibiting and interfering with the establishment, maintenance and operation of private wire and telemeter connections between [petitioners] and [respondent's] member firms and member corporations for the purpose of trading or otherwise dealing or communicating with respect to transactions, *in over-the-counter securities, municipal bonds, or securities not listed for trading on the New York Stock Exchange*" (J.A. 167-168).⁵

Respondent filed a notice of appeal on August 31, 1961 (J.A. 169). Thereafter, and on April 6, 1962, the Court of Appeals reversed the action of the District Court by a 2 to 1 vote (Appendix A, *infra*, pp. 18-32). Judge Waterman, dissenting, stated: "I would affirm on the opinion of Judge Bryan below, reported at 196 F. Supp. 209 (S. D. N. Y., 1961)".⁶

Reasons for Granting the Writ

The issues presented by this case raise questions of fundamental importance to the regulation and control of exchange and over-the-counter securities markets, to thousands of securities dealers who are not members of securi-

⁵ Emphasis supplied.

⁶ Appendix A, *infra*, p. 32.

ties exchanges, and to the administration of both the Securities Exchange Act of 1934 and the Sherman Antitrust Act. The court below held that action by the New York Stock Exchange arbitrarily prohibiting its members from doing business with non-member broker-dealers in both listed and over-the-counter securities was immune from the antitrust laws (Appendix "A", *infra*, p. 30). Since a non-member aggrieved by Exchange action purportedly taken under its filed rules has no administrative remedy before the SEC (J.A. 148),⁷ the effect of the decision below is to vest in the New York Stock Exchange power to determine the life or death of non-member over-the-counter securities dealers, to the exclusion of the only agencies charged with responsibility in such matters—the SEC and NASD.

The antitrust immunity issues which this Court is asked for the first time to decide, arise from Section 6 of the Securities Exchange Act of 1934, 15 U.S.C. § 78f, which requires a registered securities exchange to make and enforce rules for the discipline of its *members* for conduct inconsistent with "just and equitable principles of trade" and the willful violation of any provisions of the Act or any rule or regulation adopted thereunder. Or, to paraphrase the opinion of Judge Bryan in the District Court:

" . . . [whether] the provisions of the [Securities Exchange] Act requiring an Exchange to file its constitution and rules and to register are . . . a substitute for [or] supersede the anti-trust laws." (J.A. 148)

On all the questions below, the Court of Appeals was divided. Petitioners contend with Judge Waterman, that the majority erred. Petitioners' challenge is based on the proposition that Congress did not entrust the national

⁷ The SEC's General Counsel so advised the court below during oral argument.

securities exchanges with general regulatory control over all phases of the securities business and, insofar as any rules required to be filed by a national securities exchange (1) authorize arbitrary action or (2) attempt to regulate non-members in the over-the-counter securities market, there is no repugnancy between the provisions of the Securities Exchange Act of 1934 and the antitrust laws.

I

The Court Below Has Decided Important Questions Of Federal Law Which Have Not Been, But Should Be, Resolved By This Court.

(a) Section 6(c) of the Securities Exchange Act of 1934, 15 U. S. C. § 78f(c), which permits the NYSE to adopt and enforce any rule not inconsistent with the Act and the SEC's rules and regulations thereunder, must be read together with Section 19(b). That section authorizes the SEC to request an exchange to make "specified changes in its rules and practices." If, after notice and hearing upon the exchange's refusal, the SEC finds such changes necessary to protect investors "or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange," "it may supplement or alter the exchange's rules" "in respect of such matters as . . . (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange" 15 U. S. C. § 78s(b). The Court of Appeals held that since the NYSE's "wire connection rule"⁸ was filed with the SEC, the NYSE's authority to adopt and enforce it under Section 6(c), plus the SEC's power to "alter" or "supplement" it under Section 19(b),

⁸ NYSE Constitution, Art. III, Section 6, Rules 355, 356 and 358, par. 2358.13 (J.A. 205, 207-209).

disclosed a congressional intention to provide an immunity from the antitrust laws for all action taken by the NYSE in accordance therewith (Appendix A, *infra*, pp. 23-27).

The District Court held that the applicable provisions of the NYSE's constitution and rules "purport to confer upon the Exchange an absolute power to approve or disapprove all wire connections and ticker service with non-member firms and to require that such connections and services be discontinued in its absolute and uncontrolled discretion" (J.A. 134). Accordingly, and unless otherwise exempted, these provisions of the NYSE's constitution and rules were in violation of the Sherman Act. *Associated Press v. United States*, 326 U. S. 1 (1945); *Anderson v. Ship Owners' Association of Pacific Coast*, 272 U. S. 359, 364-365 (1926).

The District Court also held that "the provisions of the Securities Exchange Act requiring an Exchange to file its constitution and rules and to register are not a substitute for nor do they supersede the antitrust laws" (J.A. 148). Judge Bryan said:

"The SEC does not give affirmative sanction to the rules filed by national exchanges. Its grant of registration to an exchange goes no farther than to indicate that the rules filed meet the minimum standards required of exchanges by the statute so as to insure that its members will comply with the provisions of the law and shall not conduct themselves in a manner inconsistent with just and equitable principles of trade. Moreover, and equally important, there is no procedure by which a non-member aggrieved by action of the Exchange purportedly taken under its filed rules, may resort to administrative proceedings before the SEC to redress his grievances or to attack the rules themselves, either at the time of filing or thereafter. * * * If the theory of the Exchange were correct these plaintiffs would not only have no remedy before the Commission but would find themselves barred

from remedy in the courts also on the mere say-so of a private association. This is in marked contrast to what occurs in a recognized closed regulatory system." (J.A. 147-148)

Regulated industries are not *per se* exempt from the Sherman Act. *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 456-457 (1945). And if a statutory exemption is provided, it is strictly construed. In such cases, the exemption is granted only insofar as necessary to effect the legislative purpose. For example, in *United States v. Borden Co.*, 308 U. S. 188 (1939) and *Maryland & Virginia Milk Producers Association v. United States*, 362 U. S. 458 (1960), "this Court could not assume that Congress having granted only a limited exemption from the antitrust laws, nonetheless granted an overall inclusive one." *California v. Federal Power Commission*, 30 Law Week 4293, 4294 (1962). There is no exemption in the Securities Exchange Act itself. *United States v. Morgan, et al.*, 118 F. Supp. 621, 697 (S. D. N. Y., 1953). Yet the Court below assumed that Congress granted, not a limited exemption from the antitrust laws, but "an overall inclusive one."

In holding that the provisions of the Securities Exchange Act requiring an Exchange to file its constitution and rules and to register supersede the antitrust laws (Appendix A, *infra*, p. 27), the Court of Appeals held that securities exchanges were exempted from the Sherman Act, *per se*. This is an important question of Federal law which has not been, but should be, resolved by this Court.

(b) The basis for the Court of Appeals' holding that exchange action prohibiting its member firms from maintaining private wire connections with non-members for the purpose of transacting business in over-the-counter securities was immune from the Sherman Act (Appendix A, *infra*, pp. 27-30) was stated to be as follows:

"The structure of the Securities Exchange Act of 1934 and its legislative history disclose that the

Act was designed to require that the Securities and Exchange Commission share with the Exchanges themselves the governance of those matters which the Act regulates" (Appendix A, *infra*, p. 27).

This statement, while clearly correct with respect to Exchange members effecting transactions in the exchange and over-the-counter markets, is *clearly wrong* with respect to non-members effecting transactions in the over-the-counter market.⁹

Moreover, since petitioners were competing in the over-the-counter market with each of the Dallas member-firms with whom they had private wire connections (J.A. 50-51, 104-105), it is irrelevant that the statute gives the Exchange disciplinary powers over exchange members "with respect to their transactions in over-the-counter securities and that the policy of the statute requires that the Exchange exercise these powers fully" (Appendix A, *infra*, p. 30). The Sherman Act is violated, not only when competitors restrain independent action among themselves (*Anderson*

⁹ As distinguished from the exchange markets, the burden of policing the over-the-counter securities markets is not one which the SEC shares with the exchanges. 2 Loss, *Securities Regulation*, 1359-1364 (1961). Insofar as over-the-counter securities activities by non-exchange members are concerned, regulation is conducted in the first instance by the SEC through the broker-dealer registration provisions of the Securities Exchange Act of 1934. 48 Stat. 895, 15 U. S. C. § 78o. This is supplemented by a program of self-regulation administered by registered securities dealers associations in the field of business ethics, i.e., discipline for conduct inconsistent with just and equitable principles of trade. 52 Stat. 1070, 15 U. S. C. § 78o-3. The economic sanctions which could be imposed by this supplementary method were believed so serious and yet so vital to any effective scheme of self-regulation that Congress provided these associations a specific exemption from the antitrust laws—an exemption which was to be effective solely in this narrow area. *United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, 227, fn. 60 (1940); *International Association of Machinists v. Street*, 367 U. S. 740, 809, fn. 16 (1961); *United States v. Morgan, et al.*, 118 F. Supp. 621, 697 (S. D. N. Y., 1953).

v. Shipowners' Association of Pacific Coast, 272 U. S. 359, 364-365 [1926]), but also when they foreclose another competitor from any substantial market. *E.g.*, *International Salt Co. v. United States*, 332 U. S. 392, 396 (1947); *Associated Press v. United States*, 326 U. S. 1, 13-14 (1945); *Fashion Originators' Guild v. FTC*, 312 U. S. 457, 465 (1941).

Petitioners did not contend that the NYSE was without authority to discipline its members for derelictions in over-the-counter transactions. And the District Court did not so hold. It held that Exchange action which is directed, not against member derelictions in over-the-counter transactions, but against non-member over-the-counter securities dealers who maintain private wires with members, "was subject to such appropriate action as may be taken under the anti-trust laws" (J.A. 149-150). In holding to the contrary (Appendix A, *infra*, pp. 27-30), the Court of Appeals decided an important question of Federal law which has not been, but should be, resolved by this Court.

(c) Even "arbitrary or unreasonable" exchange action taken in accordance with rules filed pursuant to Section 6 of the Securities Exchange Act of 1934, was held immune from the antitrust laws (Appendix A, *infra*, p. 30). This holding was rationalized as follows:

"If securities exchanges were in constant danger of subjecting themselves to liability under the anti-trust laws for any misapplication of their disciplinary powers, they would understandably be reluctant to fulfill their obligations under the Securities Exchange Act." *Ibid.*

Since the court below held that "if the action of the Exchange was arbitrary or unreasonable [petitioners are not] without a remedy" on some other theory (Appendix

A, *infra*, pp. 30-31),¹⁰ it had to assume that Congress delegated to national securities exchanges power to act arbitrarily or unreasonably only insofar as the antitrust laws were concerned.¹¹ The dichotomy of purpose attributed below to Congress finds support neither in the statute nor its legislative history and can be based only on the notion that Congress believed that liability under the Sherman Act, but not under some other law, "would go far toward defeating the statutory policy of self-regulation" (Appendix A, *infra*, p. 30). This is untenable. Securities exchanges would be reluctant "to fulfill their obligations under the Securities Exchange Act" if subject to liability under any law.

In *Maryland & Virginia Milk Producers Association v. United States*, 362 U. S. 458, 466-472 (1960), this Court held that Section 6 of the Clayton Act, 15 U. S. C. § 17, exempting agricultural organizations from the antitrust laws, does not grant such organizations immunity "to engage in predatory trade practices at will." In this case, although Congress provided no exemption from the antitrust laws in the Securities Exchange Act of 1934 itself, the court below held that "arbitrary or unreasonable" exchange action was immune from the antitrust laws. This is an important question of Federal law which has not been, but should be, resolved by this Court.

¹⁰ The Court of Appeals did not identify the "remedy" and remanded the case to give the District Court an opportunity to fashion one (Appendix A, *infra*, pp. 31-32).

¹¹ In this one respect, the court below did not merely impute to Congress a purpose to delegate to securities exchanges unbridled discretion to grant or withhold private wire connections for any substantive reason they might choose—something this Court would hesitate to do. *Kent v. Dulles*, 357 U. S. 116, 128 (1958). It went further, and imputed to Congress a purpose to delegate to securities exchanges a power to exercise such discretion arbitrarily or unreasonably—something this Court will not permit it to do. *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U. S. 886, 898 (1961); *Harmon v. Brucker*, 355 U. S. 579, 581-582 (1958).

**The Decision Of The Court Below Is In Conflict
With The Applicable Decisions Of This Court.**

(a) In holding that Exchange action, not directed against derelictions of members, but against non-member over-the-counter securities dealers who maintain private wire connections with members, was exempt from the Sherman Act, the Court of Appeals provided the NYSE a blanket immunity from the antitrust laws (Appendix A, *infra*, pp. 27-30). This holding is in direct conflict with this Court's decisions in a number of cases. It is also in conflict with the views expressed by Judge Waterman's dissent (Appendix A, *infra*, pp. 32-35) and by the SEC, as *amicus curiae*, below.¹²

In *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439 (1945), Sections 1(4) and (6) of the Interstate Commerce Act, 49 U. S. C. §§ 1(4) and (6), required railroads to establish joint through rates in agreement with other railroads. Since these rates were subject to regulation by the ICC, the railroads contended that, although no specific antitrust immunity was provided, Congress intended to substitute regulation by the ICC in place of regulation by competition under the antitrust laws (324 U. S., at 457-459). This Court held that there was no clear repugnancy between the Sherman Act and the Interstate Commerce Act with respect to the rate-making conspiracy there involved and that the railroads were not exempt from the antitrust laws (324 U. S., at 456-460). In this case, the District Court made clear that "there is not the slightest indication of a congressional intent to grant any exemption from the

¹² The SEC expressed the view below that "exchange action, not properly related to the performance of its duty to discipline its members, should subject it to liability to a non-member if it violates the anti-trust laws. Exchanges do not enjoy any blanket immunity, expressly or impliedly, from such laws" (Br., p. 11).

antitrust laws with respect to the acts with which we are concerned here" (J.A. 147-150). Judge Waterman agreed (Appendix A, *infra*, p. 35).

For these reasons, as well as for those previously set forth (*supra*, pp. 10-12), the decision below is in direct conflict, not only with *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 456-460 (1945), but also with this Court's decisions in *United States v. Borden Co.*, 308 U. S. 188, 198-199, 201-202 (1939) and *Maryland & Virginia Milk Producers Association v. United States*, 362 U. S. 458, 466-472 (1960).

(b) The Court of Appeals held that the NYSE's "wire connection rule,"¹³ pursuant to which the NYSE restrains, and is authorized to restrain arbitrarily, the exercise of a member firm's freedom to establish and maintain private wire connections with non-members for the purpose of trading and communicating with respect to transactions in securities not listed for trading on the Exchange, was immunized from the antitrust laws by reason of (1) the SEC's power to amend it under Section 19(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78s(b), and (2) the SEC's failure to take action to do so (Appendix A, *infra*, p. 27).

Section 19(b) does not authorize the SEC to alter or amend an exchange rule with respect to private wire connections between members and non-members utilized for trading in securities *not* listed for trading on such exchange. 15 U. S. C. § 78s(b)(8). Assuming, *arguendo*, that it does, nothing in either the Securities Exchange Act or its legislative history reveals that the SEC was given power to decide antitrust issues as such, or that SEC inaction was intended to prevent enforcement of the antitrust laws in the courts.

For these reasons, as well as for those previously set forth (*supra*, pp. 8-10), the decision below is in direct

¹³ Op. cit., *supra*, fn. 8.

conflict with this Court's decisions in *United States v. Radio Corporation of America*, 358 U. S. 344, 346 (1959) and *California v. Federal Power Commission*, 30 Law Week 4293, 4294 (1962).

Conclusion

Congress was scrupulous in providing administrative "due process" to broker-dealers subject to registration revocation or other disciplinary proceedings under the Securities Exchange Act (see, *e.g.*, Sections 15(b), 15-A(b)(9), (g) and (h) of the Act, 48 Stat. 895, 52 Stat., 1070, 15 U. S. C. §§ 78o(b), 78o-3(b)(9), (g) and (h)). In contrast, the NYSE's Constitution and Rules, which provide elaborate procedural safeguards for members (J.A. 206-207), provide no procedural safeguards for *non-members* (J.A. 187). This was one reason why Congress chose not to authorize the exchanges to promulgate rules prohibiting members from dealing with non-members and why power to regulate the activities of non-member over-the-counter dealers was vested in the SEC and NASD exclusively. In expressing this choice, Congress permitted the NASD, a private association sharing responsibility with the SEC in policing the over-the-counter market, to promulgate rules in effect prohibiting members from dealing with, or providing services to, non-members, and granted that association an immunity from the antitrust laws.

The Court of Appeals turned this pattern of regulation on its head. Since a non-member aggrieved by exchange action purportedly taken under its filed rules has no administrative remedy before the SEC, the effect of the decision below is to vest in the securities exchanges power to determine the life or death of non-member over-the-counter dealers, to the exclusion of the SEC and NASD.

The questions petitioners raise are of fundamental importance both to antitrust enforcement in the regulated industry-antitrust field and to the administration of the Securities Exchange Act. With questions this important, with a misapplication of the applicable decisions of this Court so obvious, and with the court below so sharply divided—surely these are questions that this Court should decide.

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID I. SHAPIRO,
1411 K Street, N. W.,
Washington 5, D. C.,
Attorney for Petitioners.

DICKSTEIN, SHAPIRO & GALLIGAN,
20 East 46th Street,
New York 17, New York.

GOLDBERG, FONVILLE, GUMP & STRAUSS,
2232 Republic National Bank Building,
Dallas 1, Texas,
of Counsel.

APPENDIX A**UNITED STATES COURT OF APPEALS****FOR THE SECOND CIRCUIT**

No. 208—September Term, 1961.

(Argued February 7, 1962 Decided April 6, 1962.)

Docket No. 27211

HAROLD J. SILVER, doing business as **Municipal Securities
Company, and MUNICIPAL SECURITIES COMPANY, INC.,**
Plaintiffs-Appellees,

v.

NEW YORK STOCK EXCHANGE,
Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*

WATERMAN and HAYS, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Frederick vP. Bryan, *Judge*, granting plaintiffs' motion for summary judgment permanently enjoining defendant under Section 16 of the Clayton Act from interfering with private wire and telemeter connections between its members and plaintiffs.

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Reversed and remanded for further proceedings.

DAVID I. SHAPIRO, of Dickstein, Shapiro and Galligan, New York, N. Y. (Goldberg, Fonville, Gump and Strauss, Dallas, Texas, on the brief), *for plaintiffs-appellees.*

A. DONALD MACKINNON, of Milbank, Tweed, Hope and Hadley, New York, N. Y. (Edward J. Reilly, Jr., Squire N. Bozorth, on the brief), *for defendant-appellant.*

PETER A. DAMMANN, General Counsel, Securities and Exchange Commission, Washington, D. C. (David Ferber, Associate General Counsel, Walter P. North, Assistant General Counsel, Faith Colish, Attorney, on the brief), *for the Securities and Exchange Commission, amicus curiae.*

HAYS, *Circuit Judge:*

This is an action for damages and injunctive relief brought under Sections 4 and 16 of the Clayton Act. The principal issue is whether defendant by instructing its members to deny private wire service to the plaintiffs engaged in an activity prohibited by Section 1 of the Sherman Act. The lower court, granting plaintiffs' motion for summary judgment, held that defendant's action constituted a concerted refusal to deal which was *per se* unlawful, and gave plaintiff a permanent injunction. 196 F. Supp. 209 (S. D. N. Y. 1961). This is the order from which the present appeal is taken. We reverse on the ground that the defendant acted in pursuance of powers granted to it by the Securities Exchange Act of 1934.

The plaintiffs, Municipal Securities and Municipal Securities, Inc. are engaged in the securities business in Dallas,

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Texas. Municipal Securities deals almost exclusively in municipal bonds, Municipal Securities, Inc. in over-the-counter corporate securities. They are not members of the New York Stock Exchange. Harold J. Silver was, until his death, sole proprietor of Municipal Securities. He and his wife were the principal officers and directors of Municipal Securities, Inc.

In June, 1958, Municipal Securities, Inc. applied to the New York Stock Exchange for approval of private wire connections¹ with several offices of firms which were members of the Exchange.² The Exchange gave "temporary approval" to the proposed arrangement and the connections were installed.

Following its usual practice in such cases the Exchange ordered an investigation of Municipal Securities, Inc. and its officers. The investigation revealed several matters which appeared to the Exchange to have^a a bearing on whether approval of the application of Municipal Securities, Inc. should be made permanent. According to the Exchange, plaintiff Silver, in providing the information requested by the Exchange in connection with his application, had failed to list two corporations with which he and his wife had been connected, the Defense Department had suspended the security clearance of Silver and his wife and of another corporation in which the Silvers held a major interest, the Silvers had "apparently" breached an agreement involving the exchange of certain shares of stock, and there were "further disclosures of a derogatory nature."

On February 12, 1959, relying upon the results of its investigation and without notice to Municipal Securities,

¹ Private wires, as used here, means direct telephone and tele-meter connections.

² Municipal Securities, without applying for such approval, had at an earlier date established private wire connections with other member firms.

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Inc., the Exchange "requested" its members to discontinue the private wire connections with Municipal Securities, Inc. They did so.

The results of the investigation were disclosed only in the course of the proceedings in the lower court, and, then, according to the Exchange, only in part. Silver's attempts to learn from the Exchange the reasons for the cancellation of the wire services were unavailing. He was informed that the practice of the Exchange did not permit the disclosure of this information.

The lower court held that the action of the Exchange and its members constituted a concerted refusal to deal which violated Section 1 of the Sherman Act and was illegal *per se*.

It is quite clear that there would be, at the very least, a grave doubt as to the legality of the action of the defendant if it is not insulated from liability under the Sherman Act for such action by reason of the duties and obligations imposed upon it by the Securities Exchange Act of 1934. We hold, however, that the action of the Exchange in bringing about the cancellation of the private wire connections with members of the Exchange was within the general scope of the authority of the Exchange as defined by the 1934 Act and therefore outside the coverage of the Sherman Act.

The broad scope of the Securities Exchange Act is indicated by Section 2, Necessity for Regulation, which reads in part as follows:

"transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, . . . and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to

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protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions.”

The basic scheme of the Act contemplates that control over the conduct of members of securities exchanges will be shared by the Securities and Exchange Commission and the securities exchanges themselves, with the Commission exercising general supervisory power over the exchanges’ self-regulation. The report on stock exchange regulation by the so-called Dickinson Committee which, at the request of the President and in collaboration with the Senate Committee on Banking and Currency, formulated the fundamental plan for the legislation in this field, stated:

“It is not proposed that the Government so dominate exchanges as to deprive these organizations of initiative and responsibility . . . [We propose the formation of] a Government agency operating in this field, and endowed with wide powers to license or close exchanges, coupled with the reserve power to license individual brokers . . . , and to make rules and regulations concerning a delicate mechanism like the stock exchange [which] must be . . . so constituted as to place responsibility to the fullest extent possible on the private bodies now handling the work of security exchanges.”

“[I]t seems distinctly better, in the opinion of your committee, to stimulate the exchange to further disciplinary activity by holding it to a high degree of accountability for the conduct of [its] members.”³

³ Stock Exchange Regulation—Letter of Transmittal from the President of the United States to the Chairman of the Committee on Banking and Currency with an Accompanying Report Relative to Stock Exchange Regulation, Senate Committee Print, 73rd Cong., 2d Sess. (1934) pp. 6, 7, 8.

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The House Committee Report on the bill which became the 1934 Act said:

"It is hoped that the effect of the bill will be to give to the well-managed exchanges that power necessary to enable them to effect themselves needed reforms and that the occasion for direct action by the Commission will not arise."⁴

The Senate Committee Report said:

"Thus the initiative and responsibility for promulgating regulations pertaining to the administration of their ordinary affairs remain with the exchanges themselves. It is only where they fail adequately to provide protection to investors that the Commission is authorized to step in and compel them to do so"⁵

The structure of the Act bears out this purpose. Section 6(a) requires an exchange upon registering with the Commission to file a registration statement containing "an agreement * * * to comply, and to enforce so far as it is within its powers compliance by its members, with the provisions of" the Act and the Commission's rules and regulations thereunder. Section 6(a)(3) requires the filing with the Commission of copies of the constitution of the Exchange, and its rules. The Exchange must provide "an agreement to furnish to the Commission copies of any amendments to the rules of the Exchange forthwith upon their adoption." (Section 6(a)(4.) The rules of the Exchange must "include provision for the expulsion, suspension or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade," and must be "just and adequate to insure fair dealing and protect investors." (Section 6(d).)

⁴ H. R. Rep. No. 1383, 73rd Cong., 2d Sess. 15 (1934).

⁵ S. Rep. No. 792, 73rd Cong., 2d Sess. 13 (1934).

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Under Section 19 the Commission is authorized "if in its opinion such action is necessary or appropriate for the protection of investors—

"(1) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange if the Commission finds that such exchange has violated any provision of this chapter or of the rules and regulations thereunder or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon."

Section 19(b) provides:

"The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof;

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(3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters."

In accordance with the requirements of the Act, the constitution and rules of the defendant New York Stock Exchange were filed with the Commission. Article III, Section 6, of the constitution provides that the Board of Governors of the Exchange "shall have supervision over all matters relating to the collection, dissemination and use of quotations and of reports of prices on the Exchange and shall have the power to approve or disapprove any application for ticker service to any non-member, or for wire, wireless, or other connection between any office of any member of the Exchange, member firm or member corporation and any non-member, and may require the discontinuance of any such service or connection."

Rules 355 and 356 as they read in 1958 provided:

"Rule 355. (a) No member or member organization shall establish or maintain any wire connection, private radio, television or wireless system between his or its offices and the office of any non-member, or permit any private radio or television system be-

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tween his or its offices, without prior consent of the Exchange.

(b) Every non-member will be required to execute a private wire contract in form prescribed by the Exchange to be filed with it, unless a contract is already on file with the Exchange.

(c) Notification regarding a private means of communication with a non-member and the signed contract when necessary shall be submitted to the Department of Member Firms. This notification, by a member or allied member, may be in form supplied by the Exchange or in letter form, and shall include the essential facts concerning the non-member and the means of communication.

(d) Each member or member organization shall submit annually to the Department of Member Firms a list of all non-members with whom private means of communication are maintained.

(e) The Exchange may require at any time that any means of communication be discontinued.

Rule 356. The Exchange may require at any time the discontinuance of any means of communication whatsoever which has a terminus in the office of a member or member organization. • • • ”

As Judge Clark said in *Baird v. Franklin*, 141 F. 2d 238, 244 (2d Cir.), cert. denied, 323 U. S. 737 (1944), the Act makes it the duty of the Exchange to enforce the rules which it is required to file with the Commission.

“There can be no doubt that §6(b) places a duty upon the Stock Exchange to enforce the rules and regulations prescribed by that section. Any other construction would render the provision meaningless. Defendant’s argument that the Securities Exchange

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Act did not alter the prior status of the Stock Exchange Rules as by-laws of a private club is untenable. If all that §6(b) meant was that every exchange should pass token regulations, incapable of enforcement except at the wish of the exchange itself, there would have been no purpose for its inclusion in the Act. Sections 6(b) and (d) were surely intended to be read together, and the latter makes it clear that the purpose of the requirements of the former is 'to insure fair dealing and to protect investors.' This can be realized only if §6(b) is construed as imposing the two-fold duty upon an exchange of enacting certain rules and regulations and of seeing that they are enforced.'⁶

See also 2 Loss, Securities Regulation 1178 (1961).

To summarize: The structure of the Securities Exchange Act of 1934 and its legislative history disclose that the Act was designed to require that the Securities and Exchange Commission share with the exchanges themselves the governance of those matters which the Act regulates. The constitution and rules of the New York Stock Exchange are filed with the Commission. It is reasonably to be presumed that those regulations have the approval of the Commission since it has not taken the action which it is empowered by the statute to take to bring about their amendment. The Exchange is required by virtue of the statute to enforce its rules. As long as the Exchange acts within the scope of its statutory authority in the enforcement of its rules its action cannot be condemned as within the prohibitions of the Sherman Act.

But, it is argued, and the lower court held, that the Exchange exceeded its authority in the present case in

⁶ While Judge Clark dissented on another issue, his statement on this point reflected the view of the Court.

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acting with respect to dealings in over-the-counter securities. It may be, it is said, that the Exchange is free from the restrictions of the anti-trust laws so long as it confines its activity to matters which relate to securities which are listed on the Exchange; but when it goes beyond these limits and purports to exercise authority over dealers in the over-the-counter market it subjects itself to a charge of violation of the Sherman Act.

There is no justification in the Securities Act for drawing a distinction between the control which the Exchange is called upon to exercise over its members when they are dealing with listed securities and when they are dealing with other securities. On the contrary there are a number of references in the Act to activities connected with unlisted securities or with "any" securities (see e.g. Section 7(c)(2), Section 8(c), Section 10(b)).

The Commission urges that this case be determined "without casting any doubt upon the right and duty of registered stock exchanges to discipline their members who are engaged in practices contrary to just and equitable principles of trade, including violations of the Securities Exchange Act of 1934, and the Commission's rules thereunder, regardless of whether such practices relate to listed or unlisted securities, and whether a non-member may be indirectly adversely affected."⁷ The Commission has long recognized that what a member of an exchange does as an over-the-counter dealer has an important connection with his membership in the Exchange. In a number of cases members have been expelled or suspended from membership on securities exchanges as a penalty for derelictions in their over-the-counter business. See e.g. *Walston and Co.*, 7 S. E. C. 937 (1940), modified 9 S. E. C. 660 (1941), petition for review dismissed, 121 F. 2d 1019

⁷ Brief of Securities and Exchange Commission, *amicus curiae*, p. 14.

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(9th Cir. 1941); *W. K. Archer & Co.*, 11 S. E. C. 635 (1942), aff'd, 133 F. 2d 795 (9th Cir. 1943); *Robert DeForest Boomer*, 13 S. E. C. 102 (1943); *Mason, Moran & Co.*, 35 S. E. C. 84 (1953); *R. L. Emacio & Co.*, 35 S. E. C. 191 (1953).

The New York Stock Exchange is performing a vital public function. Its standing and reputation are important to the national economy.

"The bill proceeds on the theory that the exchanges are public institutions," said the House Committee Report⁸ referring to the bill which later became the Securities Exchange Act of 1934.

Mr. Justice Douglas, when he was Chairman of the Securities and Exchange Commission, said:

"I have always regarded the exchanges as the scales upon which that great national resource, invested capital, is weighed and evaluated. Scales of such importance must be tamper-proof, with no concealed springs—and there must be no laying on of hands. * * * Such an important instrument in our economic welfare * * * must be surrounded by adequate safeguards."

It is highly important for the proper operation of the Exchange as a public institution that its membership and procedures continue to enjoy the confidence of investors. The reputation of the Exchange is a valuable asset from the public point of view. The Exchange must have sufficient power of discipline over its members to enable it to enforce the high standards of conduct which the Act contemplates. If it is to have the requisite power it cannot be hamstrung by an unjustifiable limitation based upon

⁸ H. R. Rep. No. 1383, 73rd Con., 2d Sess. 15 (1934).

⁹ Douglas, *Democracy and Finance* (1940) 64, 65.

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whether its members are at the moment dealing in listed or in unlisted securities.

We conclude that the statute gives the Commission and the Exchange disciplinary powers over members of the Exchange with respect to their transactions in over-the-counter securities, and that the policy of the statute requires that the Exchange exercise these powers fully. In the exercise of such powers the Exchange is not subject to the restrictions of the Sherman Act.

The next question presented is whether this immunity applies regardless of the correctness or, indeed, reasonableness of a particular decision. Does a securities exchange, while acting within the general scope of its authority to discipline its members, fall into the ambit of the Sherman Act when a particular decision is arbitrary or unreasonable? To find that the Sherman Act applies in such a situation would go far toward defeating the statutory policy of self-regulation. If securities exchanges were in constant danger of subjecting themselves to liability under the anti-trust laws for any misapplication of their disciplinary powers, they would understandably be reluctant to fulfill their obligations under the Securities Exchange Act. Cf. *Booth v. Fletcher*, 101 F. 2d 676, 680 (D. C. Cir. 1938), cert. denied, 307 U. S. 628 (1939). When the exchanges are acting other than in "the clear absence of all jurisdiction over the subject matter," *Bradley v. Fisher*, 80 U. S. 335, 351 (1871), they are secure from such liability to a person aggrieved by their action. In the exercise of the powers which they are required by the statute to exercise the exchanges must be immune from prosecution under other legislation. Cf. *Gregoire v. Biddle*, 177 F. 2d 579 (2d Cir. 1949), cert. denied, 339 U. S. 949 (1950).

What has been said does not mean that if the action of the Exchange was arbitrary or unreasonable appellees are without a remedy. The Exchange is exempt from the

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restrictions of the Sherman Act because it is exercising a power which it is required to exercise by the Securities Exchange Act. The availability of judicial review is a necessary concomitant of the exercise of such power. See *Steele v. Louisville & Nashville Railroad Company*, 323 U. S. 192 (1944); *Conley v. Gibson*, 355 U. S. 41 (1957); Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 401, 769, 800-808 (1958). Compare Administrative Procedure Act § 10a, 5 U. S. C. § 1009(a) (1958). That the statute is silent on the question of judicial review is, of course, not decisive. *Estep v. United States*, 327 U. S. 114, 120 (1946).

The lower court, examining the situation for possible application to it of the "rule of reason" under the Sherman Act, found that the Exchange had acted "arbitrarily and unreasonably in directing that plaintiff's wire connections be severed." 196 F. Supp. at 227. Whatever conclusion one might reach on this issue, the procedure of the Exchange in failing to give prior notice of its action and in refusing to inform Silver of the charges made against him and to give him an opportunity to rebut these charges may well be characterized as arbitrary.

The question therefore arises as to whether the judgment below should be affirmed because an injunction might have been available to the plaintiff had the suit sought relief from the Exchange's arbitrary action rather than the remedies provided by the Clayton Act. This is not, however, a case for the application of the accepted rule that a judgment which grants an appropriate remedy will not be reversed merely because the correct result was reached on an erroneous theory. See Fed. Rules Civ. Proc. 54(c); *Mackintosh v. Estate of Marks*, 225 F. 2d 211 (3rd Cir. 1955); *Shelly v. Union Oil Co.*, 203 F. 2d 808 (9th Cir. 1953). In this case we cannot be certain that, if the plaintiff had not proceeded under the Sherman Act, the parties would not have treated the controversy quite

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differently. The plaintiff, for example, might even have sought another remedy. The Exchange might have determined to grant the plaintiff an opportunity to rebut the charges made against him. Had the district court been guided by the principles set forth in this opinion, it might have chosen to hold a hearing and to hear witnesses instead of deciding the issues by summary action and injunction.

We therefore reverse and remand to give the parties and the district court an opportunity to reconsider the case in the light of our opinion.

WATERMAN, Circuit Judge (dissenting):

I dissent. I would affirm on the opinion of Judge Bryan below, reported at 196 F. Supp. 209 (S. D. N. Y. 1961).

The majority opinion gives the appellant a significant privilege to which I believe no statute entitles it. Moreover, without mentioning that they have done so, the majority have apparently discredited that portion of the landmark decision of Judge Medina in *United States v. Morgan*, 118 F. Supp. 621 at 697 (S. D. N. Y. 1953), in which he discussed the statutory scheme of the Securities Acts of 1933 and 1934 and stated that those acts do not create any implied exemptions from the Sherman Act.

In other provisions of the Securities Exchange Act, namely those sections governing over-the-counter brokers' and dealers' associations, 52 Stat. 1070 (1938), 15 U. S. C. § 78o-3 (1958), the draftsmen of our securities statutes provided an explicit exemption from the antitrust laws. 15 U. S. C. § 78o-3(n) (1958). The presence of explicit exemptions in certain parts of a statute should make us hesitate to find a congressional intention to create implicit exemptions elsewhere in the same legislation.

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In *United States v. Borden Co.*, 308 U. S. 188 (1939), involving the scope of the Agricultural Marketing Agreement Act, 7 U. S. C. §§-601-59 (1958), it was argued that by the passage of that regulatory legislation Congress had created an implied exemption from the antitrust laws. The Supreme Court rejected the argument, stating, at pp. 197-198:

In the opinion of the court below, the existence of the authority vested in the Secretary of Agriculture, although unexercised, wholly destroys the operation of Section 1 of the Sherman Act with respect to the marketing of agricultural commodities.

We are of the opinion that this conclusion is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given, as we shall see, to agreements and orders which may validly be made by the Secretary of Agriculture, there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Anti-Trust Act and is left open to the restraints, however unreasonable, which conspiring producers, distributors and their allies may see fit to impose. We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan. We cannot believe that Congress intended to create "so great a breach in historic remedies and sanctions."

It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible.

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As a further reason for not reading in any implied exemption in that statute the court also pointed out, at 200-01, that the Agricultural Marketing Act provided explicit exemptions to the antitrust laws in those areas where that was the congressional intention. And in *Georgia v. Pennsylvania R.R. Co.*, 324 U. S. 439 (1945), the Court stated, at pp. 456-57:

These carriers are subject to the anti-trust laws. *United States v. Southern Pacific Co.*, 259 U. S. 214. Conspiracies among carriers to fix rates were included in the broad sweep of the Sherman Act. *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States v. Joint Traffic Assn.*, 171 U. S. 505. Congress by § 11 of the Clayton Act entrusted the Commission with authority to enforce compliance with certain of its provisions "where applicable to common carriers" under the Commission's jurisdiction. It has the power to lift the ban of the anti-trust laws in favor of carriers who merge or consolidate (*New York Central Securities Corp. v. United States*, 287 U. S. 12, 25-26) and the duty to give weight to the anti-trust policy of the nation before approving mergers and consolidations. *McLean Trucking Co. v. United States*, 321 U. S. 67. But Congress has not given the Commission comparable authority to remove rate-fixing combinations from the prohibitions contained in the anti-trust laws. It has not placed these combinations under the control and supervision of the Commission. Nor has it empowered the Commission to proceed against such combinations and through cease and desist orders or otherwise to put an end to their activities. Regulated industries are not *per se* exempt from the Sherman Act. *United States v. Borden Co.*, 308 U. S. 188, 198 *et seq.* It is true that the Commission's regulation

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of carriers has greatly expanded since the Sherman Act. See *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 385-386. But it is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy. *United States v. Borden, supra*, pp. 198, 199. None of the powers acquired by the Commission since the enactment of the Sherman Act relates to the regulation of rate-fixing combinations. Twice Congress has been tendered proposals to legalize rate-fixing combinations. But it has not adopted them. In view of this history we can only conclude that they have no immunity from the anti-trust laws.

I believe with Judge Bryan that, as applied to the facts in this case, there is no clear repugnancy between the Securities Exchange Act of 1934 and the Sherman Act, which requires the blanket exemption from the antitrust law which the majority here finds.

The majority believes that it can leave enforcement of the antitrust laws in the hands of the Securities and Exchange Commission despite the fact that that agency's expertise does not involve matters of antitrust law, and it does not appear that Congress intended that the Commission was to be an overseer of the antitrust laws. I do not subscribe to that belief.

APPENDIX B

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C.

§ 1:

“Every contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several States, is declared to be illegal * * *.”

Section 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C.

§ 2:

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * * shall be deemed guilty of a misdemeanor * * *.”

Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C.

§ 26:

“Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief * * * against threatened loss or damage by a violation of the antitrust laws * * *, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon * * * a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue * * *.”

Section 6 of the Securities Exchange Act of 1934, 48 Stat. 885, 15 U. S. C. § 78f:

“(a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

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“(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this chapter, and any amendment thereto and any rule or regulation made or to be made thereunder;

“(2) Such data as to its organization, rules or procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

“(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the ‘rules of the exchange’; and

“(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

“(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this chapter or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

“(c) Nothing in this chapter shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this chapter and the rules and regulations thereunder and the applicable laws of the State in which it is located.

“(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this chapter and the rules and regulations thereunder and that

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the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

“(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission’s deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

“(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration.”

Section 15(b) of the Securities Exchange Act of 1934, 48 Stat. 898, 15 U. S. C. § 78s(b):

“(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision

Appendix B

against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters."

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 150

HAROLD J. SILVER, d b a MUNICIPAL SECURITIES COM-
PANY, and MUNICIPAL SECURITIES COMPANY, INC.,
Petitioners,

v.

NEW YORK STOCK EXCHANGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF OPPOSING CERTIORARI

A. DONALD MAC KINNON
1 Chase Manhattan Plaza
New York 5, N. Y.
Attorney for Respondent

EDWARD J. REILLY, JR.
SQUIRE N. BOZORTH

Of Counsel

Supreme Court of the United States

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RESPONDENT'S BRIEF OPPOSING CERTIORARI

The basis of the petition is that the case involves important questions of federal law which have not been passed upon by this Court. A District Court hearing, as directed by the Court of Appeals, could serve only to facilitate the resolution of such legal issues in the highly complex field of securities trading.

The only issue before the Court of Appeals was petitioners' right to an injunction. In holding they were not entitled to such relief under the Clayton Act, 15 U. S. C. § 26, the Court pointed out that an injunction might nevertheless be available to petitioners and remanded the case for further proceedings. (302 F. 2d at 721.)

Questions of fact should be resolved before review by this Court.

There is a dispute as to several important factual issues relevant to the granting of an injunction—whether it be under the antitrust laws or any other law. Their resolution would, in our view, materially assist this Court in passing upon the legal issues. They include a determination as to whether respondent New York Stock Exchange (“the Exchange”) was arbitrary. A further pertinent question is whether there was any threatened loss to petitioners.

A. The Exchange was not arbitrary.

The first and third questions presented by petitioners assume that the Exchange was arbitrary. In considering this issue, it is first necessary to distinguish between (1) the basis of the Exchange’s decision and (2) the procedure adopted, i.e., the failure to give notice and grant a hearing. The importance of such distinction is apparent from *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U. S. 886 (1961), which held that an employee who had been excluded from a government factory was not entitled to notice and a hearing when the reason advanced for the exclusion was entirely rational. In acknowledging that constitutional restraints prevent such exclusion if the grounds are “patently arbitrary or discriminatory,” this Court stated that that “is not to say that all such employees have a constitutional right to notice and a hearing before they can be removed.” (367 U. S. at 898.)

The Exchange's decision to discontinue the private wires was entirely rational. It was based on the reports of independent investigators which disclosed, among other things, that Silver, in furnishing the information requested by the Exchange, had omitted the names of two corporations with which he had been connected, that the Defense Department had suspended the security clearance of the Silvers and of a corporation of which they had been officers, directors and substantial stockholders, and that their efforts to have the suspension vacated were unsuccessful. These reports also disclosed that the Silvers had apparently breached an agreement relating to the exchange of certain shares of stock. There were further disclosures of a derogatory nature. (302 F. 2d at 716; J. A. 70-71.)

The documents produced on the taking of petitioners' deposition revealed that the Silvers' security clearance had been denied on the grounds that they had "intentionally and without authorization disclosed classified security information," that they had "willfully disregarded security regulations," that their "behavior, activities and associations tend to show that [they] are not reliable and trustworthy," and that they had "deliberately falsified facts and omitted to reveal certain material facts * * * to official representatives of the U. S. Navy and U. S. Air Force." (J. A. 71, 79-84.)

The foregoing alone sufficiently demonstrates that the decision of the Exchange was not "without adequate determining principle or * * * unreasoned," as this Court defined "arbitrary" in *United States v. Carmack*, 329 U. S. 230, 243 (1946).

The Court of Appeals did not pass upon the question whether the Exchange's decision was arbitrary.

It stated only that "the procedure of the Exchange * * * may well be characterized as arbitrary." (302 F. 2d at 721.) It should be emphasized, however, that Municipal Securities Company, Inc. agreed that the private wires "shall be discontinued whenever [the Exchange] shall withdraw approval thereof." (J. A. 57.) To hold that the Exchange was required to give notice and conduct a hearing would be to disregard completely the agreement that the private wires could be discontinued at any time.

The decision of the Exchange was well grounded and the procedure adopted by it was agreed to at the time the private wires were temporarily approved. Any possible doubt on either point should not be resolved on the basis of affidavits but only after a hearing in the District Court. That hearing would develop, among other things, the purpose of the agreement relating to the private wires, the peculiar characteristics of securities trading and, most important, the many problems confronting the Exchange in meeting its obligations under the Securities Exchange Act of 1934, 15 U. S. C. § 78a *et seq.* It would also include an inquiry as to the necessity for the action taken by the Exchange to preserve its standing and reputation and to serve the investing public, the uniform application of its standards to all who apply for private wires, the impossibility of policing the actual use made of private wires by non-members, and the necessity of supervising its members with respect to their transactions in both listed and unlisted securities.

A District Court hearing could not help but be of assistance to this Court in passing upon legal questions of such importance. Mr. Justice Frankfurter's ob-

servations in *Maryland v. Baltimore Radio Show, Inc.*, 338 U. S. 912 (1950), are especially apposite. In commenting upon this Court's refusal to grant certiorari in a case involving issues which "bear upon some of the basic problems of a democratic society * * * that this Court has not yet adjudicated," he stated:

"A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." (338 U. S. at 918, 919.)

Equally pertinent is the view expressed in *Kennedy v. Silas Mason Co.*, 334 U. S. 249, 256-57 (1948), where this Court warned that "summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import * * *. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide."

B. There are questions of fact as to alleged damage.

Injunctive relief to a private plaintiff—under the antitrust laws or any other laws—requires a showing of threatened loss or damage. As this Court stated in *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500, 506-07 (1959): "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." It necessarily follows that without a showing of threatened loss the petition is premature.

Petitioners' affidavits alone raise serious questions as to whether any damage or threat of damage could be attributed to the discontinuance of the private wires in February, 1959. For example, the volume of transactions of Municipal Securities Company, Inc. in unlisted securities began a steady decline in October, 1958—four months before the private wires were discontinued. (J. A. 39.) The only appreciable reversal of that trend took place between April and July, 1959—after the private wires had been discontinued. (*ibid.*) Its transactions as principal in listed securities more than tripled shortly after the private wires were discontinued (J. A. 51-52), and its retail over-the-counter business increased by more than 15% in the six-month period after February, 1959 as compared with the prior six-month period. (J. A. 54.) The number of its transactions in unlisted securities with nine of the ten member firms with which it had private wires declined continuously since October, 1958. (J. A. 191.) Obviously, that decline could not be attributed to the discontinuance of the private wires some four and one-half months later.

Entirely aside from the fact that Municipal Securities Company, Inc. represented on its written application that it desired the private wires as a means of obtaining "continuous quotations of the New York Stock Exchange" (J. A. 55), there is no documentary proof as to the use made of such private wires, that they were anything more than a mere convenience and had no effect on petitioners' business operations, or that petitioners' demise was not due entirely to unrelated causes. For all that appears in the record, petitioners may have been able to operate just as efficiently as the majority of non-member broker dealers

in North America who, incidentally, do not have private wires with member firms. (J. A. 67.)

Moreover, although most of the statements contained in petitioners' affidavits related to matters peculiarly within their knowledge, the Exchange was denied any opportunity to impeach their testimony by cross-examination. Their credibility remained untested by that most valuable feature of the common law system. Demeanor, unrevealed by affidavits, is always an important indication of a witness' credibility. Not only would a hearing serve to bring into focus the issues of importance and the conflicting inferences which may be drawn from the facts, but also the credibility of witnesses whose testimony was accepted by the District Court in affidavit form on issues decisive to the case.

In *Poller v. Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962), this Court recently cautioned "that summary procedures should be used sparingly in complex antitrust litigation" and stated:

"It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"

See also *United States v. Diebold, Inc.*, 369 U. S. 654 (1962).

Conclusion

Petitioners' conduct throughout this case has been marked by their efforts to escape cross-examination and to avoid the development of all the relevant facts. They

succeeded, temporarily, on their motion for summary judgment. Their reluctance to participate in a hearing in the District Court represents nothing more than an unwillingness to make available to this Court the relevant facts which should be most helpful in passing upon questions of law of such importance to securities trading. The petition is premature and the writ should be denied.

Respectfully submitted,

A. DONALD MACKINNON
1 Chase Manhattan Plaza
New York 5, N. Y.
Attorney for Respondent

EDWARD J. REILLY, JR.
SQUIRE N. BOZORTH

Of Counsel

July 20, 1962

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 150

**HAROLD J. SILVER, D/B/A MUNICIPAL SECURITIES COM-
PANY AND MUNICIPAL SECURITIES COMPANY, INC.,
PETITIONERS**

v.

NEW YORK STOCK EXCHANGE

***ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT***

**MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN
SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI**

The United States believes that this case presents an important issue, not previously decided by this Court, involving the reconciliation of the antitrust laws and certain provisions of the Securities Exchange Act of 1934. The question is whether, as the Court of Appeals held, a registered securities exchange has an immunity from the Sherman Act for any actions taken "within the general scope of the authority of the Exchange as defined by the 1934 Act" to regulate the conduct of its members (Pet. App. A, 21, 27). The United States believes that this broad ruling creates

an immunity from the Sherman Act that is not justified by the Securities Exchange Act. The importance of this question in the administration of the antitrust laws makes its resolution by this Court appropriate.

STATEMENT

The basic facts are set forth in the opinion of the district court (Def. App. 128-136)¹ and are not in dispute. The two petitioners were engaged in the securities business in Dallas, Texas, as broker-dealers. Municipal Securities Company (the trade name under which Harold J. Silver operated) traded in municipal bonds, and Municipal Securities Company, Inc. (a corporation which Silver organized) traded principally in over-the-counter corporate securities. Both firms were registered with the Securities and Exchange Commission, and both were members in good standing of the National Association of Securities Dealers (an association of over-the-counter dealers registered with the Commission). Neither firm was a member of the New York Stock Exchange.

Private wire connections between over-the-counter dealers and member firms of the New York Stock Exchange who also deal in unlisted securities are important to the conduct of that business. The constitution and rules of the New York Stock Exchange require that private wire connections between members of the Exchange and nonmembers be approved by the Exchange and give the Exchange authority to require the severance of any such connections. These

¹ "Def. App." refers to the appendix for defendant-appellant in the court of appeals.

provisions provide no standards for the exercise of that authority by the Exchange.

In 1958, on the basis of the Exchange's temporary approval, petitioner Municipal Securities Company, Inc. obtained private wire connections with ten of the Exchange's member firms, and also obtained the Exchange's ticker service. (Petitioner Municipal Securities Company had previously obtained private wires to the municipal bond departments of three member firms.) In February 1959, the Exchange, following its investigation of the applications for approval of the wire connections, withdrew its ticker service and directed its members to sever their wire connections with petitioner firms. Petitioners attempted unsuccessfully to ascertain the reasons for the Exchange's action and to obtain a hearing on any charges made against them. The Exchange took the position that it was against its policy to divulge the reasons for its action. The facts developed at the trial show that among the grounds relied on by the Exchange for its action were the Defense Department's suspension of Silver's security clearance in 1953 pursuant to the Industrial Personnel Security Program, and allegedly derogatory information about Silver which the Exchange refused to disclose.

Petitioners then brought this action against the Exchange under the Sherman Act seeking injunctive relief and damages.³³ They alleged that the denial of private wire services was a concerted refusal to deal by the Exchange and its members, in violation of Section 1 of the Sherman Act, and that the with-

³³ They also alleged claims sounding in tort.

drawal of the stock ticker service violated Sections 1 and 2 of the Sherman Act.

The district court (Judge Bryan) granted partial summary judgment for petitioners on the first claim above stated (relating only to private wire connections), and enjoined the Exchange "from preventing, prohibiting or interfering with the establishment, maintenance and operation of private wire and tele-meter connections between plaintiffs and defendant's member firms and member corporations for the purpose of trading or otherwise dealing, or communicating with respect to transactions, in over-the-counter securities, municipal bonds, or securities not listed for trading on the New York Stock Exchange." (Def. App. 167-168.) In a lengthy opinion (*id.*, 126-166), the court rejected the Exchange's claim that its action was immune from the antitrust laws. The court ruled that the Exchange's disciplinary authority over its members under the Securities Exchange Act did not extend to the over-the-counter securities market. The court further held that, absent such immunity, the termination of private wire services by the member firms was a concerted refusal to deal which was a *per se* violation of the Sherman Act. The court considered and rejected each of the grounds relied on by the Exchange as justification for its actions (Def. App. 155-159), and concluded that the Exchange had acted "arbitrarily and unreasonably in directing that plaintiffs' wire connections be severed" (*id.*, 159).

A divided court of appeals reversed on the ground that the Exchange's action was immune from anti-trust liability. The majority, although acknowledging that "there would be, at the very least, a grave doubt

as to the legality of the action of the defendant if it is not insulated from liability under the Sherman Act for such action by reason of the duties and obligations imposed upon it by the Securities Exchange Act of 1934", held that "the action of the Exchange in bringing about the cancellation of the private wire connections with members of the Exchange was within the general scope of the authority of the Exchange as defined by the 1934 Act and therefore outside the coverage of the Sherman Act" (Pet. App. A, 21). Judge Waterman dissented.

DISCUSSION

The Court of Appeals held (Pet. App. A, 21, 27, 31) that a registered securities exchange has immunity from the antitrust laws for any action taken within the "general scope of the authority" which the Securities Exchange Act gives the exchange to regulate its member firms, and that this immunity covers even action which is "arbitrary or unreasonable." This ruling confers a "blanket exemption from the antitrust law"* which insulates from the prohibitions of the Sherman Act an important segment of the business practices of the financial community. The decision is likely to be of particular significance because it was rendered by the Court of Appeals for the circuit in which the country's principal securities exchanges are located and in which most litigation involving them is likely to occur. Since the United States believes that the absolute privilege or immunity which the court below gives to the exchanges is not

* Waterman, J. dissenting, Pet. App. A, 35.

justified by the Securities Exchange Act, it urges the Court to review the decision.

The rationale of the majority opinion is as follows: The "basic scheme of the [Securities Exchange] Act contemplates that control over the conduct of members of securities exchanges will be shared by the Securities and Exchange Commission and the securities exchanges themselves, with the Commission exercising general supervisory power over the exchanges' self-regulation" (Pet. App. A, 22). The Exchange's duties are carried out by enforcement of its rules, which must "reasonably * * * be presumed" to "have the approval of the Commission" (*id.*, 27). The policy of the Act "requires that the Exchange exercise these powers fully," and "[i]n the exercise of the powers which they are required by the statute to exercise the exchanges must be immune from prosecution under other legislation" (*id.*, 30). "The Exchange must have sufficient power of discipline over its members to enable it to enforce the high standards of conduct which the Act contemplates" (*id.*, 29). To apply the Sherman Act to action taken by the exchange "within the general scope of its authority to discipline its members," even though the "particular decision is arbitrary or unreasonable * * * would go far toward defeating the statutory policy of self-regulation. If securities exchanges were in constant danger of subjecting themselves to liability under the anti-trust laws for any misapplication of their disciplinary powers, they would understandably be reluctant to fulfill their

obligations under the Securities Exchange Act" (*id.*, 30).

As Judge Waterman pointed out below, the mere fact that Congress has provided a detailed regulatory scheme for an industry does not itself confer antitrust immunity for actions which the industry takes within the general framework of the regulatory pattern. This is true even where such action is taken pursuant to the authorization of a governmental body (*California v. Federal Power Commission*, 369 U.S. 482); *a fortiori* it is so where, as here, the action is that of private parties acting as "an extra-governmental agency" performing functions that ordinarily the government itself would perform (*Associated Press v. United States*, 326 U.S. 1, 19).

The Securities Exchange Act provides no explicit antitrust immunity for actions taken by registered exchanges.⁵ Under settled principles such immunity will be implied only if there is a clear repugnancy between the Act and the antitrust laws, and then only to the extent of such repugnancy. *California v. Federal Power Commission*, *supra*, pp. 485-486; *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 457; *United*

⁵ Although the silence of the Act on this point appears to present a contrast with the explicit general immunity given in Section 15A(n) to registered national securities associations, the significance to be attached to the contrast is doubtful inasmuch as Section 15A was not a part of the original Securities Exchange Act of 1934. What is now Section 15A of that Act was an entirely separate piece of legislation enacted four years later, namely, the Maloney Act of 1938 (52 Stat. 1070).

States v. Borden Co., 308 U.S. 188, 198. The basic problem, therefore, is to reach a proper accommodation of the two overlapping but equally salutary statutes, as applied to the present facts.

The Sherman Act proscribes any organized boycott in the course of trade or commerce regardless of its justification. *Fashion Originators' Guild v. Federal Trade Comm.*, 312 U.S. 457. In the absence of the Securities Exchange Act respondent's activities would seem plainly unlawful. The Securities Exchange Act, on the other hand, contemplates a considerable degree of private regulation, which may require recognition of some concomitant privilege or immunity. Section 6(b) imposes upon the exchanges the duty to discipline members "for conduct or proceeding inconsistent with just and equitable principles of trade."⁶ The United States and the Securities and Exchange Commission fully support several of the rulings in the majority opinion because they strengthen the fabric of investor protection. Thus, the opinion makes clear that an exchange, in regulating the conduct of its members, must consider all of their securities transactions, not just their trading in listed securities on

⁶ The fact that an affirmative duty of self-regulation is imposed upon exchanges is emphasized by the full text of Sec. 6(b) which reads—

(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

the exchange. We do not suggest that the power to require conduct consistent with "just and equitable principles of trade" could not extend to cutting off private wire service to petitioners because they were non-members dealing in over-the-counter markets.⁷ The regulatory functions of adopting and enforcing rules should include whatever is appropriate to prevent conduct which is inconsistent with just and equitable principles of trade, including willful violations of the Act or rules thereunder, and to insure fair dealing and to protect investors. Similarly, the opinion below properly reaffirms the decision of the same circuit nearly twenty years ago in *Baird v. Franklin*, 141 F. 2d 238, certiorari denied, 323 U.S. 737, that an exchange must not only enact but also enforce rules for the discipline of its members. The Act contemplates an extensive and effective degree of self-regulation by an exchange, including *inter alia* enforcement, not just adoption, of rules.⁸ If any aspect of the

⁷ The Commission took an *amicus* position in the Court of Appeals primarily in an effort to overcome certain implications in the district court opinion which appeared to support what the Commission regards as an unduly narrow view of the power and duty of an exchange to regulate the conduct of its members for the protection of investors who may deal with them. The Commission desired that no doubt be cast on the power and duty of a registered exchange to regulate the conduct of its members in all of their securities transactions, including their transactions otherwise than on the exchange.

⁸ Pursuant to the Congressional mandate contained in a 1961 amendment of Section 19(d) of that Act (Public Law 87-196), the Commission is currently in the midst of a special study, one of the principal objectives of which is to determine whether the present pattern of regulation of the securities markets, including its self-regulatory aspects, is adequate.

duty of self-regulation were to be seriously impaired, investor protection would suffer. The Commission has neither the power nor the resources to fill completely gaps which might be created by impairment of the function of self-regulation by exchanges.

But while the policy of promoting self-regulation may well require giving registered exchanges an immunity from normal antitrust rules when they are acting against conduct which is inconsistent with "just and equitable principles of trade"—and may also require immunity where their action was *reasonable even though mistaken*—there is no need for an *absolute immunity*.

The present case, in its appellate posture, falls in the last category. On the motion for summary judgment the district court found (Def. App. 159), after considering the grounds on which the Exchange sought to justify its action, that the Exchange had acted "arbitrarily and unreasonably in directing that plaintiff's wire connections be severed." The court of appeals did not disturb that finding. The finding itself shapes the legal issue now presented for review, and consequently we do not go behind it to consider either its correctness or whether it would be substantiated by the evidence at a trial. The court below stated (Pet. App. A, 31) that "the procedure of the Exchange in failing to give prior notice of its action and in refusing to inform Silver of the charges made against him and to give him an opportunity to rebut these charges may well be characterized as arbitrary," but held (Pet. App. A, 30) that "this immunity [from the antitrust laws] applies regardless of the correctness or, indeed, reasonableness of a particular decision."

Such arbitrary action by an exchange cannot be justified as the proper implementation of its duty to insure that its members observe "just and equitable principles of trade." The law rarely recognizes a privilege so absolute. Judges and other public officials have such a privilege in cases involving defamatory statements in the course of their duties, *Spalding v. Vilas*, 161 U.S. 483, and perhaps the privilege extends to actions for malicious prosecution, *Gregoire v. Biddle*, 177 F. 2d 579 (C.A. 2), but usually privileges based upon the public interest depend upon good faith and the reasonableness of the actor's conduct. *E.g.*, *Restatement of Torts*, §§ 119, 143, 147, 196, 204. No exception, applicable to private persons even when acting in defense of the public interest, comes readily to mind. Since the Securities Exchange Act is silent, no greater immunity from normal liabilities, including liability under the Sherman Act, can be inferred.

Nor can immunity be predicated on the theory, adopted by the Court of Appeals (Pet. App. 27), that since the constitution and the rules of the Exchange had been filed with the Commission, "[i]t is reasonably to be presumed that those regulations have the approval of the Commission since it has not taken the action which it is empowered by the statute to take to bring about their amendment." Although an exchange is required to file its rules and regulations with the Commission (Section 6(a)), and although the Commission in certain circumstances may make changes in an exchange's rules (Section 19(b)),⁹ an

⁹ Section 19(b) authorizes the Commission, if such action is deemed "necessary or appropriate for the protection of inves-

exchange may, without Commission approval, adopt rules which are not inconsistent with the Act and the Commission's rules thereunder, or with applicable State law (Section 6(c)). Thus, it cannot fairly be assumed, as the court below did, that the Commission has approved the particular exchange rules here involved. Indeed, the Commission would hardly have any basis for determining whether these rules comport with the statutory standards of the Securities Exchange Act. The rules merely provide that no exchange member may maintain any wire connection with any nonmember without the prior consent of the Exchange, and that the Exchange may require at any time that any means of communication be terminated (see Pet. App. A, 25-26).

In any event, the Commission has no authority to review action taken by an exchange in applying its rules. The Commission has not approved or disapproved the particular actions of the Exchange upon which this suit is based.

The Court of Appeals suggested (Pet. App. A, 30) that even though petitioners have no cause of action under the antitrust laws, they are not "without a remedy" against arbitrary or unreasonable action by the Exchange. The court did not specify what such remedy might be, and it is far from clear that, apart from the antitrust laws, petitioners would

tors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange," to require changes in exchange rules dealing with certain enumerated subjects.

be able to vindicate their rights. Furthermore, assuming the availability of an action of tort under State law (presumably for "conspiracy" or intentional interference with advantageous relations), petitioners would again encounter the argument that Section 6(b) and the policy of encouraging private self-regulation give the exchanges a statutory privilege or immunity. There is not the slightest reason for concluding that a modification of the antitrust laws was intended but no change in other sources of liability, and any implied exemptions must therefore be deemed coextensive.

While the willingness and ability of the stock exchanges to exercise their disciplinary powers over members in proper cases is naturally related to the risk of liability and may therefore require recognition of some corresponding privilege or immunity, we think that imposing liability for arbitrary and capricious action is not likely to render an exchange appreciably more reluctant to perform this salutary function. But even if the tendency were established, it would not be sufficient to establish such a repugnancy between the Securities Exchange and the Sherman Acts that the latter can be deemed *pro tanto* repealed. Congress has not seen fit to confer an unqualified antitrust immunity for all action taken by an exchange in the purported exercise of its regulatory authority over its members. If such immunity is to be provided, it is for Congress, rather than the courts, to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

LIONEL KESTENBAUM,
MELVIN SPAETH,
Attorneys.

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HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES
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PANY, INC.,

Petitioners,

—v.—

NEW YORK STOCK EXCHANGE,

Respondent.

REPLY FOR PETITIONERS

DAVID I. SHAPIRO,
1411 "K" Street, N. W.,
Washington 5, D. C.,
Attorney for Petitioners.

DICKSTEIN, SHAPIRO & GALLIGAN,
20 East 46th Street,
New York 17, N. Y.

GOLDBERG, FONVILLE, GUMP & STRAUSS,
2232 Republic National Bank Building,
Dallas 1, Texas,
of Counsel.

Supreme Court of the United States

October Term, 1962

No. 150 *z*

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY,
and MUNICIPAL SECURITIES COMPANY, INC.,

Petitioners,

—v.—

NEW YORK STOCK EXCHANGE,

Respondent.

REPLY FOR PETITIONERS

Although the United States, petitioners and respondent all agree that the questions raised by the petition are important and far-reaching, respondent urges that certiorari be denied at this time. Apart from the issue of damages (Res. Br., 5-7), respondent ignores Question 2 of the Questions Presented (Pet., 2-3, 10-12, 14-15) and, focusing its opposition on Questions 1 and 3 (Res. Br., 2), alleges that consideration of these issues is premature (Res. Br., 2-5).

I

This Court's consideration of the antitrust immunity issues presented by Questions 1 and 3 of the Questions Presented (Pet., 2-3) can in no way be aided by a district court hearing on the issue of arbitrary action. While the court below might have ordered a trial on this issue prior to granting the Exchange an absolute immunity from the antitrust laws on the facts as found by the district court

(Pet. App. A, 21, 30-31),¹ it did not do so. The Court of Appeals foreclosed further consideration by the district court of any antitrust issue (Pet. App. A, 21, 27, 30, 31), and as the *amicus* correctly points out, "it is far from clear that, apart from the antitrust laws, petitioners would be able to vindicate their rights".² Review by this Court now is therefore "fundamental to the future conduct of the case". *United States v. General Motors Corporation*, 323 U. S. 373, 377 (1945); *Land v. Dollar*, 330 U. S. 731, 734, ftn. 2 (1947); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 685, ftn. 3 (1949); cf. *S. W. Sugar & Molasses Corp. v. River Terminals Corp.*, 360 U. S. 411, 414-415 (1959).

II

Respondent's prematurity argument on damages (Res. Br., 5-7) does not warrant serious consideration by this Court.

In determining that petitioners had established the non-existence of any genuine issue as to the fact of "threatened loss or damage" under Section 16 of the Clayton Act, 15 U. S. C. § 26 (J. A. 160), the district court relied on (1) a statement by one of respondent's member-firms that private wire connections were available to most other broker-dealers who were members of the National Association of

¹ The district court found that (1) the applicable provisions of the NYSE's constitution and rules "purport to confer upon the Exchange an absolute power to approve or disapprove all wire connections and ticker service with non-member firms and to require that such connections and services be discontinued in its absolute and uncontrolled discretion" (J. A. 134); (2) the "record fails to substantiate the charges against the Silvers" (J. A. 155); and (3) the conduct of the Exchange [could not] be justified by the denial of security clearance * * *, nor by any of the other facts and circumstances upon which it relied" (J. A. 159).

² Brief for United States, *amicus curiae*, pp. 12-13.

Securities Dealers in Dallas (J. A. 152, 181); (2) respondent's concession that, prior to the time the private wires were withdrawn, petitioners were afforded an easier and more rapid means of communication with respondent's member-firms (J. A. 153, 160); and (3) the fact that petitioners incurred actual out-of-pocket expenses for substitute facilities (J. A. 96-97, 103-104, 198-199, 200-202). Since these facts were either conceded or undisputed, the district court concluded that the withdrawal of petitioner's private wires to NYSE member-firms "could not fail to injure the [petitioners'] business" (J. A. 160). The district court was clearly right. *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 461 (1945); *Bedford Cut Stone Co. v. Journeyman Stonecutters' Assn.*, 274 U. S. 37, 54-55 (1927); *Ring v. Spina* (S. D. N.Y.), 84 F. Supp. 403, 406, modified (2 Cir.), 186 F. 2d 637, certiorari denied, 341 U. S. 935 (1951).

CONCLUSION

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID I. SHAPIRO,
1411 "K" Street, N. W.,
Washington 5, D. C.,
Attorney for Petitioners.

DICKSTEIN, SHAPIRO & GALLIGAN,
20 East 46th Street,
New York 17, N. Y.

GOLDBERG, FONVILLE, GUMP & STRAUSS,
2232 Republic National Bank Building,
Dallas 1, Texas,

of Counsel.

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Supreme Court of the United States

October Term, 1962

No. 150

**HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES
COMPANY and MUNICIPAL SECURITIES COM-
PANY, INC.,**

Petitioners,

v.

NEW YORK STOCK EXCHANGE,

Respondent.

**On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit**

BRIEF FOR PETITIONERS

DAVID I. SHAPIRO,
1411 K Street, N. W.,
Washington 5, D. C.,
Attorney for Petitioners.

DICKSTEIN, SHAPIRO & GALLIGAN,
20 East 46th Street,
New York 17, N. Y.

GOLDBERG, FONVILLE, GUMP & STRAUSS,
2232 Republic National Bank Building,
Dallas 1, Texas,
of Counsel.

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Supreme Court of the United States

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**HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY
and MUNICIPAL SECURITIES COMPANY, INC.,**
Petitioners,

v.

NEW YORK STOCK EXCHANGE,
Respondent.

**On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit**

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals is reported at 302 F. 2d 714. The opinion of the District Court is reported at 196 F. Supp. 209 (S. D. N. Y. 1961).

Jurisdiction

The judgment of the court below was entered on April 6, 1962 (R. 272). A petition for a writ of certiorari was filed on May 31, 1962, and was granted on October 8, 1962 (R. 273). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Statement of Questions Presented

1. Do the provisions of Sections 6 and 19(b) of the Securities Exchange Act of 1934, 48 Stat. 885, 898, 15 U. S. C. §§ 78f and 78s(b), immunize from the antitrust laws those provisions of the constitution and rules of a registered securities exchange by which said exchange is authorized to arbitrarily restrain the exercise of a member firm's freedom to establish and maintain private wire connections with non-members for the purpose of trading and communicating with respect to transactions in securities not listed for trading on said exchange?

2. Do the provisions of Section 6 of the Securities Exchange Act of 1934, 48 Stat. 885, 15 U. S. C. § 78f, which require a securities exchange to make and enforce rules against members who engage in conduct inconsistent with just and equitable principles of trade and wilful violation of provisions of the Securities Exchange Act, immunize from the antitrust laws exchange action not directed against the derelictions of members, but against non-member over-the-counter securities dealers?

3. Assuming, *arguendo*, that a registered securities exchange is immune from the antitrust laws for action taken in accordance with its rules filed under Section 6 of the Securities Exchange Act of 1934, does such immunity extend to arbitrary or unreasonable exchange action requiring exchange members to cease maintaining private wire connections with non-members?

Statutory Provisions Involved

The statutes involved are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1 and 2; Sections 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§ 15 and 26; and Sections 6 and 19(b) of the Securities

Exchange Act of 1934, 48 Stat. 885, 898, 15 U. S. C. §§ 78f and 78s(b).

The pertinent portions of these statutes are set forth in Appendix A *infra*, at pp. 33-36.

Statement of the Case

The District Court made extensive findings with respect to those facts about which no genuine dispute existed (R. 204-211, 229-233). These findings were left undisturbed by the Court of Appeals (R. 257-268).

A. Parties and Cause of Action

Petitioner Harold J. Silver, d/b/a Municipal Securities Company (hereinafter referred to as "MSC"), is a sole proprietorship engaged in the securities business. Virtually all of its activities are concerned with municipal bond transactions. Petitioner Municipal Securities Company, Inc. (hereinafter referred to as "MSC, INC."), a corporation organized under the laws of Texas, also engaged in the securities business, principally in over-the-counter securities. Petitioners MSC and MSC, INC. were licensed as securities dealers under the laws of Texas, were registered broker-dealers with the Securities and Exchange Commission (SEC), and were members in good standing of the National Association of Securities Dealers (NASD) (R. 17-18, 20, 24). Petitioners were not members of the New York Stock Exchange (R. 204).

Respondent New York Stock Exchange (hereinafter referred to as "NYSE" or the "Exchange") is an unincorporated association with an authorized membership of 1375. It provides facilities for its members and their firms to transact business in corporate securities listed for trading by the Exchange. While actual trading takes place

on the exchange floor in New York, its members do business nationwide. It is the largest and most important of the national stock exchanges (R. 18, 94, 205).¹

The complaint alleges, *inter alia*, a conspiracy between the NYSE and various of its member firms (named as co-conspirators, but not as parties) to deprive petitioners of private wire and telemeter connections with such member firms and of the NYSE's stock ticker service, all to petitioners' competitive disadvantage in violation of the Sherman Act, 15 U. S. C. § 1, *et seq.* (R. 1, 203).

B. Private Wire Connections and Stock Ticker Service

In September 1956, MSC installed direct private telephone wires to the municipal bond departments of two NYSE member firms, one non-member firm and three Dallas banks (R. 22-23). In May 1958, an additional direct wire was installed between MSC's office and the office of the Dallas Union Securities Company which later became a NYSE member (R. 23). Approval by the NYSE of the private wire connections between MSC and the Exchange's member firms was neither requested nor granted (R. 42, 125). MSC utilized these private wire connections solely to obtain quotations and transact business in "municipal securities, municipal bonds and unlisted securities" (R. 155).

¹ The District Court found: "The [NYSE] lists select corporate securities which include those of many of the country's largest and most important corporations. It provides a quality market for its members to execute orders for the purchase and sale of securities so listed for their own accounts and for the accounts of customers. The Exchange also lists a few select municipal bonds. The market price for a listed security is established by auction on the floor of the Exchange. Market prices are in a constant state of flux, many of them rapidly changing from moment to moment. The market is extremely sensitive to variations in price, even slight fluctuations causing spurts of buying and selling." (R. 205).

On June 23, 1958, MSC, INC. mailed to the NYSE an "Agreement for Continuous Quotations of the New York Stock Exchange," i.e., stock ticker service (R. 57). On June 25, 1958, the NYSE advised MSC, INC. that its "application for continuous stock quotation service has been temporarily approved, pending further processing" (R. 61), and actual installation of the "ticker" was made on July 8, 1958 (R. 25, 39). MSC, INC. utilized the continuous stock quotation (ticker) service to keep "abreast of movements and trends in security prices generally" (R. 40) and "as a customer accommodation" (R. 26).²

Prior thereto, and on June 13, 1958, MSC, INC. had requested the NYSE to approve the installation of private wire connections between its office and the Dallas offices of nine NYSE member firms (R. 50). This was done on a NYSE form entitled "Application for Private Wire Connection" (R. 47). At the same time, MSC, INC. sent the NYSE a form entitled "Information to be Furnished by Non-Member for Private Wire Connections or Ticker Service" (R. 51). Temporary approval was granted by the NYSE at various times during the period June 18, 1958 through August 13, 1958 and the wires were installed (R. 25). MSC, INC. utilized these private wire connec-

² The District Court found: "The prices of securities listed by the Exchange and traded in on its floor are supplied by continuous stock quotation service which goes by ticker to member firms, to many non-member broker-dealers and to various other places where such quotations are of interest. The ticker provides up to the minute quotations of the prices at which listed securities are being currently traded on the floor of the Exchange. The service is carried over the facilities of the Western Union Telegraph Company and is for purposes of information only." (R. 205).

tions primarily to obtain quotations and transact business in over-the-counter securities (R. 26-27, 40-41).²

² The District Court found:

"A large number of securities are not listed either on the New York Stock Exchange or on the other national exchanges. These securities are dealt in on the so-called over-the-counter market and are known as over-the-counter securities. The market price for over-the-counter securities is established by traders at their desks in the numerous firms dealing in securities throughout the country. Such traders are in constant communication with their counterparts in other firms seeking buyers or sellers in particular securities at the best price available. There is no central trading place for over-the-counter securities. The market in them is established by the offers to buy and sell which are communicated between traders. Thus the supply and demand of the over-the-counter market establishes the going bid and asked prices for any particular security at any particular moment of the trading day (R. 205-206).

"Extensive communication networks facilitate trading in securities. The principal medium which firms engaged in the securities business use to communicate with one another is the private wire connection. This is a direct telephone wire over which traders may instantly communicate with one another to exchange information and transact business. A trader in one firm can establish contact with a trader in another simply by flipping a switch (R. 206).

"Depending on the number of wire connections a firm may have, a single trader in over-the-counter securities can, by using different switches on a board before him, make offers to buy or sell and obtain offers from a variety of other firms within a matter of seconds. These are direct circuits and no dialing or waiting is necessary. Thus traders have the ease and speed of immediate and direct communication. Similar communication is also carried on by direct telemeter or teletype and, in addition, some business is transacted by the more usual means of business communication (R. 206).

"While many dealers in over-the-counter securities are not members of the Exchange many of the member firms and corporations, including these involved here, do an extensive business in over-the-counter securities and in unlisted municipal bonds. Private wire connections between over-the-counter securities dealers, who are not members of the Exchange, and member firms, facilitate transactions between them in unlisted securities and municipals, and also provide facilities by which customers of non-member firms who desire to purchase or sell listed securities can have their orders transmitted to member firms for rapid execution." (R. 206).

C. The Withdrawal of Private Wire Connections and Stock Ticker Service

On February 12, 1959, without notice to MSC or MSC, INC., a staff meeting of the NYSE's Department of Member Firms was held in New York City. At that meeting, MSC, INC.'s applications for private wire connections (R. 47) and continuous stock quotation service (R. 57) were disapproved (R. 28). On the same day, the NYSE instructed its member firms to discontinue their private wire connections with MSC, INC. (R. 28). By March 2, 1959, all private wire connections between MSC and MSC, INC. on the one hand, and NYSE member firms on the other, were discontinued (R. 29-30, 42-43, 93).

On February 16, 1959, MSC, INC. received a letter from the NYSE advising that its temporary approval of the stock ticker service had been withdrawn and that service would be discontinued as of February 18, 1959 (R. 70). Thereafter, petitioners addressed a letter to both the president and chairman of the NYSE's Board of Governors, requesting (1) temporary reinstatement of the services; (2) the reasons for the action of the New York Stock Exchange; and (3) an opportunity to answer any charges and present whatever information that might be required (R. 71-72). All of these requests "were met with categorical refusal" (R. 74, 75, 210).

D. The Reasons for the NYSE's Action

Petitioners were given no reason for the Exchange's action prior to the commencement of suit (R. 210-211, 214). Later, on petitioners' motion for summary judgment (R. 15), the Exchange asserted that it took the action it did because (1) its investigation had turned up "scurrilous matter with respect to the Silvers";⁴ (2) the Silvers had

⁴ The nature of this information has never been disclosed to petitioners, petitioners' counsel, or even the courts below (R. 214-215, 229-230).

sold certain shares of the U. S. Hoffman Machinery Corporation in 1955, two months after acquiring them, although at the time of the acquisition they had stated in writing that they had "no present intention" of selling them; (3) MSC, INC.'s application for private wire connections and stock ticker service had omitted from a long list of corporate connections covering a ten year period the names of two corporations with which Silver had been connected; and (4) in 1953, some six years prior to the NYSE's action, the Defense Department had suspended the "security clearance" of a corporation (not one of those omitted from MSC, INC.'s application) in which the Silvers were principal officers (R. 214-215).

The District Court found that (1) the "record fails to substantiate these charges against the Silvers" (R. 229-233) and (2) "the conduct of the Exchange [could not] be justified by the denial of security clearance * * *, nor by any of the other facts and circumstances upon which it relied" (R. 232). The Assistant Director of the NYSE's Department of Member Firms "expressly stated that the action of the Exchange was not based on any criminal conviction of either of the Silvers, or on any false or misleading statements made by them to the SEC in any application for the registration of securities, or on any specific matters regarding securities transactions other than the alleged transactions in U. S. Hoffman stock" (R. 232-233). With respect to the U. S. Hoffman stock transactions, the District Court found: "The SEC was fully apprised of these transactions and acquiesced in the sale without the need for a registration certificate. The material submitted to the SEC in justification of the sale, which is uncontroverted by the Exchange, demonstrates that the Silvers did not act in bad faith either in the statements made at the time of the acquisition or in making the sales" (R. 230).

The District Court's "inescapable conclusion from what [was] relied on by the Exchange in justification [was] that

[the Exchange] acted arbitrarily and unreasonably in directing that plaintiffs' wire connections be severed" (R. 233).⁵

E. Proceedings Below

Petitioners commenced this action on April 3, 1959 by filing a complaint in the United States District Court for the Southern District of New York (R. 1). Jurisdiction was based on diversity of citizenship and the Federal anti-trust laws (R. 2). After answer (R. 13) and extensive discovery by both sides (R. 214), petitioners moved for partial summary judgment (R. 15). Petitioners' motion was granted on May 19, 1961 (R. 201) and, on June 18, 1961, the District Court filed a written opinion containing its findings of fact and conclusions of law (R. 203).

The District Court entered an order granting petitioners a permanent injunction under Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. § 26 (R. 239-240). Respondent filed a notice of appeal on August 31, 1961 (R. 241). On April 6, 1962, the Court of Appeals reversed the action of the District Court by a 2 to 1 vote (R. 256). Judge Waterman, dissenting, stated: "I would affirm on the opinion of Judge Bryan below, reported at 196 F. Supp. 209 (S. D. N. Y., 1961)" (R. 268).

Summary of Argument

The antitrust immunity issues which this Court is asked for the first time to decide, arise from Section 6 of the Securities Exchange Act of 1934, 15 U. S. C. § 78f, which

⁵ The Court of Appeals did not disturb this finding. It said: "Whatever conclusion one might reach on this issue, the procedure of the Exchange in failing to give prior notice of its action and in refusing to inform Silver of the charges made against him and to give him an opportunity to rebut these charges may well be characterized as arbitrary" (R. 267).

requires, *inter alia*, a registered securities exchange to make and enforce rules for the discipline of its *members* for conduct inconsistent with "just and equitable principles of trade" and the willful violation of any provisions of the Act or any rule or regulation thereunder. Or, to paraphrase the opinion of Judge Bryan in the District Court:

" * * * [whether] the provisions of the [Securities Exchange] Act requiring an Exchange to file its constitution and rules and to register are * * * a substitute for [or] supersede the antitrust laws." (R. 222)

On all the questions below, the Court of Appeals was divided. Petitioners contend with Judge Waterman (R. 268-271), that the majority erred. Petitioners' challenge is based on the proposition that Congress did not entrust national securities exchanges with general regulatory control over all phases of the securities business and, insofar as any rules required to be filed by a national securities exchange (1) attempt to regulate non-members in the over-the-counter market or (2) authorize arbitrary action, there is no repugnancy between the provisions of the Securities Exchange Act and the antitrust laws.

I

The pertinent provisions of the NYSE's constitution and rules, as here applied, covered private wire connections between members and non-members utilized for trading in securities *not* listed for trading on the Exchange. The District Court held that they purported "to confer upon the Exchange an absolute power to approve or disapprove all wire connections * * * with non-member firms and to require that such connections * * * be discontinued in its absolute and uncontrolled discretion" (R. 209). These provisions of the NYSE's constitution and rules were therefore in violation of the Sherman Act, unless exempted

by reason of the Securities Exchange Act. *Associated Press v. United States*, 326 U. S. 1 (1945).

The action of the NYSE's member-firms—taken in accordance with the Exchange's constitution and rules—was a concerted refusal to deal on the same terms and conditions as NYSE member-firms were willing to deal with one another and with non-members other than petitioners. Accordingly, the NYSE's action ran afoul of the Sherman Act. For, as the District Court pointed out: "An offer to deal only under discriminatory terms or conditions is just as violative of the Sherman Act and its purposes as a refusal to deal altogether." (R. 227). The law is clear. Unless the NYSE is immunized from the antitrust laws by reason of its statutory obligations under the Securities Exchange Act, its action in this case was illegal *per se*. *Fashion Originators' Guild v. FTC*, 312 U. S. 457 (1941); *Klor's, Inc. v. Broadway-Hale Stores*, 359 U. S. 207 (1959).

II

The Securities Exchange Act provides no explicit anti-trust immunity for actions taken by registered exchanges. Under settled principles no such immunity will be implied unless there is a clear repugnancy between the Act and the antitrust laws, and then only *pro tanto* to the extent of the repugnancy. *E.g., Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 457 (1945). In this case, no such repugnancy exists.

Section 6(b) of the Securities Exchange Act, which requires the NYSE to make and enforce rules for the discipline of its members for conduct "inconsistent with just and equitable principles of trade" and the willful violation of any provisions of the Act, provides no antitrust immunity for exchange action directed, not against the derelictions of members, but against non-members who maintain private wire connections with members. In the

instant case, the NYSE's action was directed, not against illegal or unethical member conduct, but against non-members believed to be "untrustworthy persons of * * * doubtful character" (R. 229). The District Court correctly held that so long as Exchange "members do not indulge in conduct which is illegal or inconsistent with just and equitable principles of trade, [the NYSE] has neither the power nor the authority to determine with whom its members may or may not deal * * *." (R. 223-224).

Section 6(c) of the Securities Exchange Act, which permits the NYSE to adopt and enforce any rule not inconsistent with the Act and the SEC's rules and regulations thereunder, must be read together with Section 19(b). That section authorizes the SEC to supplement or alter an exchange's rules "in respect of such matters as * * * (8) *the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange* * * *". 15 U. S. C. § 78s(b).

The majority below held that the NYSE's rule against non-approved wire connections was immunized from the antitrust laws because "it is reasonably to be presumed that [that rule has] the approval of the Commission since it has not taken the action which it is empowered to take [under section 19(b)] to bring about [its] amendment" (R. 264). This holding was clearly wrong. Section 19(b) does not authorize the SEC to alter or amend an exchange rule with respect to private wire connections between members and non-members utilized for trading in securities *not* listed for trading on such exchange. 15 U. S. C. § 78s(b)(8). Assuming, *arguendo*, that it does, nothing in either the Securities Exchange Act or its legislative history reveals that the SEC was given power to decide antitrust issues as such, or that SEC inaction was intended to prevent enforcement of the antitrust laws in the courts. Moreover, the SEC did not approve "the particular exchange rules here involved" and, in any event, the SEC "has no

authority to review action taken by an exchange in applying its rules."

The holding of the District Court that the provisions of the Securities Exchange Act "requiring an exchange to file its constitution and rules and to register are not a substitute for nor do they supersede the antitrust laws" (R. 222) was correct. *E.g.*, *United States v. Radio Corporation of America*, 358 U. S. 334, 346 (1959); *California v. Federal Power Commission*, 369 U. S. 482, 485 (1962); *United States v. Borden Co.*, 308 U. S. 188, 198 (1939).

III

Assuming, *arguendo*, that the NYSE was immune from the antitrust laws for action taken in accordance with its rules filed under Section 6 of the Securities Exchange Act, it is nonetheless clear that Congress provided no immunity for arbitrary or unreasonable Exchange action. The District Court found that the NYSE "acted arbitrarily and unreasonably" (R. 233) and the Court of Appeals did not disturb that finding.

Regulated industries are not *per se* exempt from the Sherman Act. *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 456-457 (1945). If a statutory exemption is provided, it is strictly construed. In such cases, the exemption is granted only insofar as necessary to effect the legislative purpose. For example, in *United States v. Borden Co.*, 308 U. S. 188 (1939) and *Milk Producers Association v. United States*, 362 U. S. 458 (1960), "this Court could not assume that Congress having granted only a limited exemption from the antitrust laws, nonetheless granted an overall inclusive one." *California v. Federal Power Commission*, 369 U. S. 482, 485 (1962). There is no exemption in the Securities Exchange Act itself. Yet the majority below assumed that Congress granted, not a limited exemption from the anti-trust laws, but "an overall inclusive

one." The majority below, fearing that liability under the Sherman Act, but not under some other law, "would go far toward defeating the statutory policy of self-regulation" (R. 266), held that Exchange action, even if arbitrary, was impliedly immune. We think it plain, and not open to serious question, that "[i]mmunity from the antitrust laws is not [so] lightly implied." *California v. Federal Power Commission, supra.*

ARGUMENT

Introduction

In its order granting petitioners partial summary judgment, the District Court permanently enjoined the NYSE from preventing the establishment and operation of private wire connections between MSC and MSC, INC. on the one hand, and NYSE member firms on the other (R. 240). The order in no way limited the NYSE's control over its own "quotations" and was restricted to private wire connections maintained and operated "for the purpose of trading or otherwise dealing, or communicating with respect to transactions, in over-the-counter securities, municipal bonds, or securities not listed for trading on the New York Stock Exchange" (R. 240).

Once it is recognized that the District Court's order was limited to private wire connections utilized to carry on an over-the-counter securities business, the major issue of this case assumes its proper focus, i.e., whether the NYSE's obligation under Section 6 of the Securities Exchange Act to make and enforce rules for the discipline of its *members* for conduct "inconsistent with just and equitable principles of trade" superseded the antitrust laws in the circumstances of this case. That issue was resolved by the District Court, as follows:

"Providing that its members do not indulge in conduct which is illegal or inconsistent with just

and equitable principles of trade, an exchange has neither the power nor the authority to determine with whom its members may or may not deal or to direct them to desist from dealing with non-member broker/dealers engaged in transactions in over-the-counter securities and municipals. If it does so it does so at its peril and is subject to such appropriate action as may be taken under the antitrust laws." (R. 223-224).⁶

The District Court was clearly right.

I

Unless Otherwise Immune, the NYSE's Action Violated the Sherman Act

Since the "over-the-counter market is a negotiated market in which, for the most part, *dealers* acting as principals buy from and sell to investors or other dealers at an undisclosed profit * * *,"⁷ perhaps the most important tool of a dealer in this market is his communications system, *i.e.*, his means of obtaining and publishing quotations for those securities not traded on the Exchange (R. 26, 84, 114-119). And for the securities dealer actively engaged in over-the-counter trading, private wire connections with other over-the-counter dealers are essential to a rapid gathering and dissemination of these quotations (R. 206). "Fast communications are important facilities * * * because it is over these [wires] that the great bulk of the buying and selling of securities are transacted." Loeser, *The Over-*

⁶ Emphasis supplied.

⁷ 2 Loss, *Securities Regulation*, 1277 (1961). This is to be contrasted with the exchange markets, *i.e.*, "auction markets where the orders of buyers and sellers are concentrated for the purpose of offering transactions through the meeting of the highest bid and the lowest offer," the exchange members acting as brokers for a disclosed commission. *Ibid.*

The-Counter Securities Market, 32 (1940). Professor Loss points out:

"The over-the-counter market knows no ticker, nor is there any other public record of actual transactions. Bid and asked quotations for particular securities are circulated by those dealers who are interested in making a market for them. And a given dealer may circulate two sets of quotations—an "inside" market at which he indicates interest in buying from or selling to other dealers, and an "outside" market, within the range of which he indicates an interest in buying from or selling to a member of the public."

. . .

"Despite these differences from the exchange markets, the over-the-counter market has an organization and behavior patterns which, while more subtle, are no less real. The principal over-the-counter firms are inter-connected by an intricate, nationwide wire system which tends to keep bids and offers more or less in line—and is sufficiently effective, as any over-the-counter firm will attest, for a New York rumor to be repeated in San Francisco almost in a matter of seconds. Indeed, it has been suggested that 'over-the-telephone' might be a more accurate description of the market than 'over-the-counter.' The various firms know from the [National Quotation Bureau] sheets and otherwise who the specialists are in particular securities, and they are continually chattering and trading back and forth over their direct telephone and teletype wires. There are no 'seats' in the over-the-counter market and no experience or education qualifications. All that is necessary is state and SEC registration in most cases—supplemented . . . by a degree of self-regulation by the NASD, to which most of the principal broker-dealers belong. The over-the-counter broker-dealers vary from a First Boston Corporation—which does more volume than some of the smaller stock exchanges—to the one-man shop in the 'sticks' whose owner perhaps supplements his real estate and insurance business by selling securities on the side. *Many of the principal firms also hold seats, or*

*have members who do, on the various exchanges, and many firms which are thought of primarily as exchange firms do a substantial business over the counter."*⁸ (Emphasis supplied.)

The percentage of over-the-counter corporate securities trading transactions performed by NYSE member firms is unknown. Undoubtedly, however, it represents a substantial portion of the total. 2 Loss, *Securities Regulation*, 1283, ftn. 20 (1961). Thus, when the NYSE prohibits its member firms from maintaining private wire connections with a non-member who is an over-the-counter securities trader, the effect of its action may be tantamount to excluding that trader from a substantial part of the over-the-counter securities market (R. 40-41, 43-44, 76, 206, 226).

A. The NYSE's Constitution and Rules

Article III, section 6 of the NYSE Constitution⁹ provides that the Board of Governors of the Exchange:

"Shall have power to approve or disapprove any application for ticker service to any non-member, or any wire, wireless or other connection between any office of the Exchange, member firm and any non-member, and may require the discontinuance of any such service or connection." (R. 194-195).

Rule 355 of the NYSE's Rules provides:

"(a) No member or member organization shall establish or maintain any wire connection, private radio, television or wireless system between his or its offices and the office of any non-member, or permit any private radio or television system between his or its offices, without prior consent of the Exchange.

"(b) Every non-member will be required to execute a private wire contract in form prescribed by

⁸ *Op. cit.*, *supra*, ftn. 7, at pp. 1278-1283.

⁹ NYSE Constitution and Rules, C. C. H. Ed. (1959).

the Exchange to be filed with it, unless a contract is already on file with the Exchange.

“(c) Notification regarding a private means of communication with a non-member and the signed contract when necessary shall be submitted to the Department of Member Firms. This notification, by a member or allied member, may be in form supplied by the Exchange or in a letter form, and shall include the essential facts concerning the non-member and the means of communication.

“(d) Each member or member organization shall submit annually to the Department of Member Firms a list of all non-members with whom private means of communication are maintained.

“(e) The Exchange may require at any time that any means of communication be discontinued.” (R. 196-197).

Rule 356 of the NYSE's Rules provides:

“The Exchange may require at any time the discontinuance of any means of communication whatsoever which has a terminus in the office of a member or member organization.” (R. 197).

Rule 358, para. 2358.13 of the Rules provides:

“Prohibited Wire Connections.—No member, allied member or member organization may utilize any private or public wire connection or any other means of communication whatsoever to transmit any business directly or indirectly with or for:

“(1) Any illicit or illegal organization;

“(2) any organization, firm or individual making a practice of dealing on differences in market quotations; or

“(3) any organization, firm or individual engaged in purchasing or selling securities for customers and making a practice of taking the side of the market opposite to the side taken by the customers.” (R. 198).

These provisions of the NYSE's constitution and rules apply to private wire connections between members and non-members which are used not only for "reporting transactions of listed securities," but also for trading, and communicating with respect to, over-the-counter (unlisted) securities. See Rule 358, para. 2358.10 (R. 197). If any doubt remains, the deposition of the Assistant Director of the NYSE's Department of Member Firms removes it (R. 180, 186, 193-194).

This was the practical interpretation of Rule 355(a) made by the NYSE in this very case. The Court will note that MSC had private wire connections with the municipal bond departments of three NYSE member firms in Dallas. These wires were used solely in connection with obtaining quotations and transacting business with respect to "municipal securities, municipal bonds and unlisted securities" (R. 155). Yet, despite the fact that the NYSE "does not furnish quotations in connection with municipal securities or unlisted stocks" (R. 155) and that none of these member firms had sought NYSE approval prior to installing these "municipal bond" wires (R. 42), respondent conceded (R. 93) that it construed its action of February 12, 1959 to apply to such connections as well (R. 42-43).

The coercive effect of the NYSE's constitution and rules¹⁰ upon a member firm's right of independent action is demonstrated by Exhibits 17 through 25C (R. 63-66), Exhibits 27 through 33 (R. 69), and the deposition of Walter Coleman, Assistant Director of the NYSE's Department of Member Firms. According to Mr. Coleman, no member firm had ever failed (during the seven to eight-year period of his recollection) to discontinue a private wire connection with a non-member after having been instructed by the NYSE to do so (R. 181-182).

¹⁰ See particularly, NYSE Constitution, Art. XIV, Sections 6 and 10 (R. 195).

The foregoing makes clear that the NYSE's rule against non-approved wire connections¹¹ is a device through which the NYSE restrains member firms from establishing and maintaining private wire connections with non-members, thereby excluding such non-members from a substantial part of the over-the-counter securities market. Indeed, the anti-competitive effect of this rule was a matter of congressional knowledge as early as 1913. *H. R. Rep. No. 1593*, 62d Cong., 3d Sess., 34-35 (1913). The District Court held that it purported "to confer upon the Exchange an absolute power to approve or disapprove all wire connections * * * with non-member firms and to require that such connections * * * be discontinued in its absolute and uncontrolled discretion" (R. 209). It therefore violated the Sherman Act, unless it was otherwise exempted. *Associated Press v. United States*, 326 U. S. 1 (1945); *Anderson v. Ship Owners' Association of Pacific Coast*, 272 U. S. 359, 364-365 (1926); *Montague & Co. v. Lowry*, 193 U. S. 38, 46-47 (1904).

B. The Concerted Refusal to Deal

By March 2, 1959—and as a result of the NYSE's directive—all private wire connections between MSC and MSC, INC. on the one hand, and NYSE member-firms on the other, were discontinued (R. 29). Such action was not an *absolute* refusal to deal.¹² It was, instead, a concerted refusal to deal on the same terms and conditions as NYSE member-firms were willing to deal with one another and

¹¹ NYSE Constitution, Art. III, Section 6; Rules 355 and 356, and Rule 358, para. 2358.13 (R. 194-198).

¹² In fact, after MSC, INC.'s private wire connections to the NYSE's member firms had been discontinued, communications were made by conventional means, i.e., telephone. This method took an average time period measureable in minutes (rather than seconds as in the case of a private wire), the time differential placing MSC, INC. at a serious competitive disadvantage so far as its over-the-counter trading activities were concerned (R. 33-34, 43-44).

with non-members other than MSC and MSC, INC. (R. 65, 226). Accordingly, the NYSE's action ran afoul of the Sherman Act. For, as the District Court pointed out: "An offer to deal only under discriminatory terms or conditions is just as violative of the Sherman Act and its purposes as a refusal to deal altogether" (R. 227).¹³ Each such concerted refusal to deal is illegal *per se*. *Klor's, Inc. v. Broadway-Hale Stores*, 359 U. S. 207, 209 (1959); *Radiant Burners v. Peoples Gas Light & Coke Co.*, 364 U. S. 656 (1961).

Professor Handler points out:

"The interesting effort to discriminate between the justifiable and unjustifiable boycott has now been halted—both are unqualifiedly proscribed. It will, of course, come as no surprise to students of antitrust that group boycotts should be held to be *per se* unlawful. The teaching of Fashion Originator's Guild was that the social desirability of the end or purpose of the boycott could not withdraw it from statutory condemnation." Handler, *Recent Developments in Antitrust Law: 1958-1959*, 59 Col. L. Rev. 843, 864-865 (1959).

The same view is expressed by Professor Oppenheim:

"While it was previously arguable that the Court had preserved a limited area for reasonable collective refusals to deal in exceptional instances; *Klor's* has reduced this prospect to a mirage." Oppenheim, *Selected Antitrust Developments*, 15 A.B.A. Section of Antitrust Law 37, 55 (1959).

The law is clear. Unless the NYSE is immunized from the antitrust laws by reason of its statutory obligations under the Securities Exchange Act, its action in this case

¹³ *United States v. First National Pictures, Inc.*, 282 U. S. 44, 53-55 (1930); *Associated Press v. United States*, 326 U. S. 1, 17 (1945); *Montague & Co. v. Lowry*, 193 U. S. 38, 41-42 (1904); *California League of Independent Insurance Producers v. Aetna Casualty & S. Co.*, 179 F. Supp. 65, 66 (N. D. Cal., 1959).

was illegal *per se*. *Fashion Originators' Guild v. FTC*, 312 U. S. 457 (1941).

II

The NYSE's Action Was Not Immunized From the Antitrust Laws

The Securities Exchange Act provides no explicit anti-trust immunity for actions taken by registered securities exchanges. *United States v. Morgan, et al.*, 118 F. Supp. 621, 697 (SDNY, 1953). Under settled principles no such immunity will be implied unless there is a clear repugnancy between the Act and the antitrust laws, and then only *pro tanto* to the extent of the repugnancy. *California v. Federal Power Commission*, 369 U. S. 482, 485-486 (1962); *Milk Producers Assn. v. United States*, 362 U. S. 458, 469-470 (1960); *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 457 (1945); *United States v. Borden Co.*, 308 U. S. 188, 198 (1939). In this case, no such repugnancy exists.

Before turning to specifically consider the problem, and because the NYSE is charged with certain obligations and responsibilities under the Securities Exchange Act of 1934, it is necessary to consider first the nature of the regulatory role assigned the NYSE in either the "exchange" or "over-the-counter" markets or both.

A. The Exchange Market

Section 6(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78f(b), requires a registered securities exchange to make and enforce rules for the discipline of its members for conduct inconsistent with "just and equitable principles of trade" and the wilful violation of any provisions of the Act or any rule or regulation adopted thereunder. *Baird v. Franklin*, 141 F. 2d 238, 244 (2 Cir., 1944), certiorari denied, 323 U. S. 737 (1944). At the same time

the Exchange is authorized by section 6(c) of the Act, 15 U. S. C. § 78f(c), to adopt any rule not inconsistent with the Act, the SEC's rules and regulations thereunder, and the applicable laws of the state in which it is located. *Exchange Buffet Corp. v. New York Stock Exchange*, 244 F. 2d 507 (2 Cir., 1957). Congress proceeded on the theory that exchanges are public institutions, not private clubs, and did not place upon the SEC "the entire burden of policing the Exchange markets, but relie[d] in some measure upon the Exchanges themselves to assure high standards of trade and to discipline members who violate those standards." *Avery v. Moffatt*, 187 Misc. 576, 55 N. Y. S. 2d 215, 227-228 (1945).

In this area, i.e., the exchange market, cooperative policing activities between the SEC and the Exchange are limited to Exchange *members* or *member firms*. In other words, while the Securities Exchange Act of 1934 in no way affected the right of the exchanges to discipline their own members, even for derelictions in over-the-counter transactions, power to prevent abuses by non-members was vested in the SEC. Thus, whenever an exchange's facilities are or are about to be used by a non-member in violation of the Act, not only is the SEC empowered to act immediately to enjoin such violation under section 21(e), 15 U. S. C. § 78u(e), but, in addition, it is empowered under section 19(a)(3) to suspend or expel from an exchange any member who (with knowledge of the violation) effected the non-member's transaction. 15 U. S. C. § 78s(a)(3). 2 Loss, *Securities Regulation*, 1172 (1961).

B. The "Over-the-Counter" Market

The "over-the-counter" securities market has been defined as embracing every stock transaction other than on a national securities exchange. *Speed v. Trans-America Corp.*, 99 F. Supp. 808, 830 (D. C. Del., 1951); 2 Loss, *Securities Regulation*, 1277 (1961). Here, as in the ex-

change markets, cooperative policing activities between the SEC and the Exchange are limited to Exchange *members* or *member-firms*. Congress did not authorize the exchanges to share responsibility with the SEC for policing the over-the-counter activities of non-members.

In the Securities Exchange Act of 1934, Congress attempted to solve the problem of "policing" the over-the-counter securities markets by (1) requiring brokers and dealers in over-the-counter securities to register with the SEC in accordance with the provisions of sections 15(a) and (b) of the Act, 15 U. S. C. § 78o(a), (b); (2) establishing an SEC broker-dealer inspection program pursuant to section 17(a)₂ of the Act, 15 U. S. C. § 78q(a); and (3) adopting the anti-fraud provisions set forth in sections 10(b) and 15(c)(1) of the Act, 15 U. S. C. §§ 78j(b), 78o(c)(1).

While the provisions on registration, inspection, and prevention and punishment of fraudulent practices furnished a foundation for an adequate regulatory solution, Congress believed that the job was incomplete. Supplementary regulation on an ethical plane was required "in order to protect the investor and the honest dealer alike from dishonest and unfair practices by the submarginal element in the industry," and "to cope with those methods of doing business which, while technically outside the area of definite illegality, [were] nevertheless unfair both to customer and to decent competitor, and [were] seriously damaging to the mechanism of the free and open market." *S. Rep. No. 1455*, 75th Cong., 3d Sess., 3 (1938); *H. R. Rep. No. 2307*, 75th Cong., 3d Sess., 4 (1938). And since regulation of an industry's *ethics* meant a substantial amount of *self-regulation*, Congress adopted this philosophy when it enacted the Maloney Act in 1938. 2 Loss, *Securities Regulation*, 1361 (1961).

C. Pattern of Federal Registration—Over-the-Counter Markets

Apart from the Act's inspection and anti-fraud provisions, the SEC is authorized to deny or revoke (after notice and hearing) the registration of any broker or dealer (1) for any false or misleading statement of any material fact in a registration application; or (2) for conviction (at any time within the ten years preceding the filing of the application) of a felony or misdemeanor involving the purchase or sale of any security; or (3) who is subject to a court order enjoining him from engaging in any conduct or practice in connection with the purchase or sale of any security; or (4) who has wilfully violated any provision of the Securities Act of 1933 or the Securities Exchange Act of 1934 or any SEC rule or regulation thereunder. 15 U. S. C. § 78o(b). In addition, section 15-A was adopted in 1938 to supplement the SEC's administration and enforcement of the Act's inspection, anti-fraud, and registration provisions.

Section 15-A provides that no broker or dealer can be admitted into membership of a registered association of securities dealers if (a) such broker or dealer was suspended or expelled from a national securities exchange for conduct inconsistent with just and equitable principles of trade or (b) the SEC has revoked his registration. 15 U. S. C. § 78o-3(b)(4). And no broker or dealer can remain a member of such association if, after notice and hearing (and following review by the SEC), the association finds him guilty of conduct inconsistent with just and equitable principles of trade or in violation of the association's rules. 15 U. S. C. §§ 78o-3(b)(9), (g), (h)(1), (h)(2). This is important because section 15-A(i) of the Act, 15 U. S. C. § 78o-3(i), provides:

“The rules of a registered securities association may provide that no member thereof shall deal with any non-member broker or dealer * * * except at the

same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the general public.”¹⁴

In *National Association of Securities Dealers, Inc.*, 19 SEC 424, 441 (1945) the Commission said that this provision makes it “virtually impossible for a dealer who is not a member of the NASD to participate in a distribution of important size” (underwriting). And, “entirely apart from underwriting, members may give each other the benefit of special discounts in ordinary trade which they do not give to the general public and hence may not give to non-member brokers and dealers.” 2 Loss, *Securities Regulation*, 1370 (1961).

Since any association adopting such a rule would have violated the Sherman Act, Congress provided an immunity. *United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, 227, ftn. 60 (1940); *International Association of Machinists v. Street*, 367 U. S. 740, 809, ftn. 16 (1961).¹⁵ That immunity, as set forth in section 15-A(n) of the Act, 15 U. S. C. § 78o-3(n), exempts from the antitrust laws those rules of a registered association of securities dealers (and only such an association) which discriminate against non-members or those ineligible for membership. *United States v. Morgan, et al.*, 118 F. Supp. 621, 697 (S. D. N. Y., 1953); *National Association of Securities Dealers, Inc.*, 19 SEC 424 (1945); 2 Loss, *Securities Regulation*, 1370 (1961).

The foregoing demonstrates that, insofar as “over-the-counter” activities by non-exchange members are concerned, regulation was to be conducted in the first instance by the SEC through the broker-dealer registration pro-

¹⁴ For a full description of the congressional purpose in enacting the provision, see *S. Rep. No. 1455*, 75th Cong., 3d Sess., 8-9 (1938); *H. R. Rep. No. 2307*, 75th Cong., 3d Sess., 9 (1938); 2 Loss, *Securities Regulation*, 1369-1370 (1961).

¹⁵ Frankfurter, J., dissenting.

visions of the Securities Exchange Act of 1934. This was to be supplemented by the NASD's program of self-regulation in the field of business ethics (i.e., discipline for conduct inconsistent with just and equitable principles of trade). The economic sanctions which could be imposed by this supplementary method were believed so serious and yet so vital to any effective scheme of self-regulation that a specific exemption from the antitrust laws was provided—an exemption which was to be effective solely in this narrow area. Obviously, this pattern of "over-the-counter" regulation permits, as to non-members, no intrusion by the New York Stock Exchange, nor any antitrust exemption to the NYSE under the doctrine of "supersession to an extent." See *Pennsylvania Water & Power Co. v. Federal Power Commission*, 193 F. 2d 230, 235 (C. A. D. C.), aff'd 343 U. S. 414 (1952).

D. Supersession to an Extent

Section 6(b) of the Act, which requires the NYSE to make and enforce rules for the discipline of its members for conduct "inconsistent with just and equitable principles of trade" and the wilful violation of any provisions of the Act, provides no antitrust immunity for exchange action directed, not against the derelictions of members, but against non-members who maintain private wire connections with members. Cf. *Chamber of Commerce v. Federal Trade Commission*, 13 F. 2d 673, 687 (8 Cir., 1926). And, in the instant case, the NYSE's action was directed, not against illegal or unethical member conduct, but against non-members believed to be "untrustworthy persons of * * * doubtful character". (R. 229). The holding of *Baird v. Franklin*, 141 F. 2d 238 (2 Cir., 1944), is that an exchange is required to enforce its rules against members (*id.*, at p. 244), not that the NYSE is subject to liability for failure to enforce a rule which, as to non-members, is illegal under the Sherman Act. See *Pirnie Simons & Co. v. Whitney*, 144 Misc. 812, 259 N. Y. S. 193, 211-213 (1932). "It would

be illegal for [exchange members] to agree not to transact any business with him at all, for no other reason than that they did not like him or his business, and it would be illegal for them to combine not to buy or sell for him, while he was a member of any particular club * * * or political organization * * *." *Heim v. Stock Exchange*, 64 Misc. 529, 118 N. Y. S. 591, 593 (1909).

Section 6(c) of the Act, which *permits* the NYSE to adopt and enforce any rule not inconsistent with the Act and the SEC's rules and regulations thereunder, must be read together with Section 19(b). That section authorizes the SEC to request an exchange to make "specified changes in its rules and practices." If, after notice and hearing upon the exchange's refusal, the SEC finds such changes to be necessary to protect investors "or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange," it may supplement or alter the exchange's rules "in respect of such matters as * * * (8) *the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange* * * *." 15 U. S. C. § 78s(b) (emphasis supplied).

The majority below held that the NYSE's "wire connection rule",¹⁶ as applied, was immunized from the anti-trust laws because "it is reasonably to be presumed that [that rule has] the approval of the Commission since it has not taken the action which it is empowered to take to bring about [its] amendment". (R. 264). This holding is clearly wrong. Section 19(b), which gives the SEC power "to insure fair administration of [the] exchange" with respect to Exchange rules concerning "(8) *the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange* * * *," 15 U. S. C. § 78s(b)(8), does not include private wire connections between members and non-members utilized to communicate

¹⁶ *Op. cit.*, *supra*, fn. 11.

with respect to transactions in over-the-counter markets. A private wire connection is to the over-the-counter market what the "ticker" is to the exchange market. 2 Loss, *Securities Regulation*, 1278-1283 (1961). Moreover, as the United States makes clear, the SEC did not approve "the particular exchange rules here involved" and, in any event, the SEC "has no authority to review action taken by an exchange in applying its rules."¹⁷

The District Court held that the provisions of the Securities Exchange Act "requiring an Exchange to file its constitution and rules and to register are not a substitute for nor do they supersede the antitrust laws" (R. 222). Judge Bryan said:

"The SEC does not give affirmative sanction to the rules filed by national exchanges. Its grant of registration to an exchange goes no farther than to indicate that the rules filed meet the minimum standards required of exchanges by the statute so as to insure that its members will comply with the provisions of the law and shall not conduct themselves in a manner inconsistent with just and equitable principles of trade. Moreover, and equally important, there is no procedure by which a non-member aggrieved by action of the Exchange purportedly taken under its filed rules, may resort to administrative proceedings before the SEC to redress his grievances or to attack the rules themselves, either at the time of filing or thereafter. * * * If the theory of the Exchange were correct these plaintiffs would not only have no remedy before the Commission but would find themselves barred from remedy in the courts also on the mere say-so of a private association. This is in marked contrast to what occurs in a recognized closed regulatory system." (R. 222).

This holding was clearly right. *E.g.*, *United States v. Radio Corporation of America*, 358 U. S. 334, 346 (1959); *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 456-457 (1945); *United States v. Borden Co.*, 308 U. S. 188, 197-198 (1939).

¹⁷ Brief for United States in support of petition for writ of certiorari, p. 12.

III

**Congress Provided No Immunity for
Arbitrary Exchange Action**

We have shown that Section 6(b) of the Act, which *requires* the NYSE to make and enforce rules for the discipline of its *members*, provides no antitrust immunity for exchange action directed not against illegal or unethical member conduct, but against non-members who maintain private wire connections with members. The District Court correctly held that so long as Exchange "members do not indulge in conduct which is illegal or inconsistent with just and equitable principles of trade [the NYSE], has neither the power nor the authority to determine with whom its members may or may not deal * * *." (R. 223-224).

Assuming, *arguendo*, that the District Court was incorrect, and that a concerted refusal to deal with "untrustworthy" non-members is immune from the antitrust laws, it is clear, nonetheless, that Congress provided no immunity for arbitrary or unreasonable Exchange action. Congress, which could not itself deny petitioners "due process", did not empower the NYSE to do so. In fact, Congress was scrupulous in providing administrative "due process" to the broker-dealers whom it subjected to registration revocation or other disciplinary proceedings under the Securities Exchange Act. See *e.g.*, Sections 15(b), 15-A(b)(9), (g) and (h) of the Act, 15 U. S. C. §§ 78o(b), 78o-3(b)(9), (g) and (h).

The District Court found that the NYSE had "acted arbitrarily and unreasonably in directing that [petitioners'] wire connections be severed" (R. 233). The Court of Appeals did not disturb this finding. It said: "Whatever conclusion one might reach on this issue, the procedure of the Exchange in failing to give prior notice of its action and in refusing to inform Silver of the charges made

against him and to give him an opportunity to rebut these charges may well be characterized as arbitrary" (R. 267). It could hardly have been otherwise. The NYSE's Constitution and Rules, which provide elaborate procedural safeguards for members (R. 195-196), provide no procedural safeguards for nonmembers (R. 74).

In *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439 (1945), this Court held that Certificate No. 44, which granted railroad rate bureaus an explicit immunity from the antitrust laws, did "not sanction the use of coercion * * *, [nor] authorize any combination to discriminate against a region in the establishment of rates" (*id.*, at p. 459, fn. 7). In *Milk Producers Assn. v. United States*, 362 U. S. 458 (1960), this Court later held that section 6 of the Clayton Act, 15 U. S. C. § 17, which exempts agricultural organizations from the antitrust laws, did not grant such organizations immunity "to engage in predatory trade practices at will". *Id.*, at page 406. In this case, despite the absence of an explicit exemption, the majority below, fearing that liability under the Sherman Act, but not under some other law,¹⁸ "would go far toward defeating the statutory policy of self-regulation" (R. 266), held that Exchange action, even if arbitrary, was impliedly immune.

"Immunity from the antitrust laws is not [so] lightly implied." *California v. Federal Power Commission*, 369 U. S. 482, 485 (1962).

¹⁸ The majority below held that "if the action of the Exchange was arbitrary or unreasonable", petitioners were not without some other, but unspecified, remedy (R. 267-268).

CONCLUSION

By reason of the foregoing, the judgment of the court below should be reversed.

Respectfully submitted,

**DAVID L. SHAPIRO,
1411 K Street, N. W.,
Washington 5, D. C.,
*Attorney for Petitioners.***

**DICKSTEIN, SHAPIRO & GALLIGAN,
20 East 46th Street,
New York 17, N. Y.**

**GOLDBERG, FONVILLE, GUMP & STRAUSS,
2232 Republic National Bank Building,
Dallas 1, Texas.
*of Counsel.***

APPENDIX A**STATUTORY PROVISIONS INVOLVED**

Section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C.

§ 1:

"Every contract, combination in the form of trust or otherwise, in restraint of trade or commerce among the several States, is declared to be illegal * * *."

— Section 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C.

§ 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States * * * shall be deemed guilty of a misdemeanor * * *."

Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C.

§ 26:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief * * * against threatened loss or damage by a violation of the anti-trust laws * * *, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon * * * a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue * * *."

Section 6 of the Securities Exchange Act of 1934, 48 Stat. 885, 15 U. S. C. § 78f:

"(a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

"(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this chapter, and any amendment thereto and any rule or regulation made or to be made thereunder;

"(2) Such data as to its organization, rules or procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

"(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as 'the rules of the exchange'; and

"(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

"(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this chapter or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

"(c) Nothing in this chapter shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this chapter and the rules and regulations thereunder and the applicable laws of the State in which it is located.

"(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this chapter and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Com-

mission shall cause such exchange to be registered as a national securities exchange.

“(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission’s deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

“(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration.”

Section 19(b) of the Securities Exchange Act of 1934, 48 Stat. 898, 15 U. S. C. § 78s(b):

“(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration

or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters."

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 150

**HAROLD J. SILVER, D/B/A MUNICIPAL SECURITIES COM-
PANY AND MUNICIPAL SECURITIES COMPANY, INC.,
PETITIONERS**

v.

NEW YORK STOCK EXCHANGE

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (R. 256-271) is reported at 302 F. 2d 714. The opinion of the district court (R. 203-238) is reported at 196 F. Supp. 209.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1962 (R. 272). The petition for a writ of certiorari was filed on May 31, 1962, and was granted on October 8, 1962 (R. 273; 371 U.S. 808). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Sherman Act, the Clayton Act, and the Securities Exchange Act of 1934, are set forth in the appendix *infra*, pp. 59-77.

QUESTION PRESENTED

Whether the provisions of the Securities Exchange Act of 1934 give the respondent stock exchange an absolute immunity under the Sherman Act for its action in directing termination of wire connections between its members and petitioners, who are nonmember brokers and dealers.

INTEREST OF THE UNITED STATES

This case presents an important issue involving the reconciliation of the antitrust laws and certain provisions of the Securities Exchange Act of 1934. In the latter Act, Congress provided an extensive system of self-regulation by which the nation's registered securities exchanges, under the supervision of the Securities and Exchange Commission, have the duty and responsibility of insuring that their members observe "just and equitable principles of trade." The various registered exchanges have, over the past quarter of a century, built up a body of rules and precedents which have played an important role in improving the ethical standards in the securities markets. In the present case, the court of appeals held that this statutory scheme of self-regulation confers an implied immunity from the antitrust laws for actions taken by an exchange "within the general scope of [its] authority" to regulate its members,

even though such action in a particular case may be "arbitrary or unreasonable" (R. 258, 264, 266-267).

This ruling is of concern to the United States in two respects: (1) On the one hand, we recognize that, in order to insure that registered exchanges properly carry out their duty to regulate their members, and thus maintain for investors the high ethical standards in the securities business which the Act contemplates, it may sometimes be necessary to permit the exchanges to take action which, were it not for the system of self-regulation provided by the Act, might run afoul of the standards of the antitrust laws. (2) On the other hand, we think it equally important that, because the exchange is a private and not a governmental body, any implied antitrust exemption it may have should be no broader than is essential for the proper performance of its statutory duties under the Securities Exchange Act.

As we shall develop in this brief, the reconciliation of these sometimes conflicting objectives presents difficult and delicate problems. We think it clear, however, that the ruling of the court of appeals—which, as the dissent pointed out (R. 271), gives the exchange a "blanket exemption from the antitrust law"—goes far beyond whatever may be necessary to enable the exchange to accomplish its statutory responsibilities under the Securities Exchange Act. The broad immunity thus conferred finds no justification in the language, the legislative history or the basic regulatory design of that Act.

STATEMENT

This is a civil suit for injunctive relief and damages brought by two over-the-counter brokers and dealers against the New York Stock Exchange, based on the latter's action in directing its member firms to sever their wire connections with the plaintiffs. The district court held that the Exchange had violated Section 1 of the Sherman Act, and granted a permanent injunction. A divided court of appeals reversed, holding that the Securities Exchange Act of 1934 gave the Exchange antitrust immunity.

1. *The operation of the securities markets.*

Securities trading in this country takes place both on the floors of the various securities exchanges, and in the over-the-counter market.¹ There are 14 exchanges registered with the Securities and Exchange Commission; only members of an exchange may trade thereon. The respondent New York Stock Exchange is the largest and most important of the registered exchanges.

The over-the-counter market is a phrase used to describe the trading that takes place other than on the exchanges. The trading takes place directly between brokers and dealers, who may be located in the same city or across the country. Most of the over-the-counter trading involves securities not listed on the exchanges, but a substantial volume of listed securities is also traded. Both exchange members and

¹ See generally 2 Loss, *Securities Regulation*, pp. 1170, 1277-1287; Friend, Hoffman and Winn, *The Over-The-Counter Securities Markets* (McGraw Hill, 1958).

non-members deal over-the-counter; when a non-member wishes to execute a transaction on an exchange, however, he is required to deal through a member.

Critical to the existence and responsiveness of the modern nationwide securities business is a vast communications network which connects exchanges, members and nonmembers. By this network, almost instantaneous price quotations, offers and bids, may be obtained by brokers and dealers anywhere in the country. For listed securities, the key to the market is provided by the continuous reports of exchange trading on stock quotation services, especially the respondent's, and the private wire connections among members and nonmembers. For unlisted securities, the market is established by the offers communicated between the traders, and the transactions consummated between them, often through private wires connecting the trading firms; there is also a daily quotation service giving the previous day's bid and asked prices.

The importance to the over-the-counter firms of direct private wire connections with member firms was explained by the district court, as follows (R. 206):

* * * [T]he private wire connection * * * is a direct telephone wire over which traders may instantly communicate with one another to exchange information and transact business. A trader in one firm can establish contact with a trader in another simply by flipping a switch.

Depending on the number of wire connections a firm may have, a single trader in over-the-counter securities can, by using different

switches on a board before him, make offers to buy or sell and obtain offers from a variety of other firms within a matter of seconds. These are direct circuits and no dialing or waiting is necessary. Thus traders have the ease and speed of immediate and direct communication. Similar communication is also carried on by direct telemeter or teletype and, in addition, some business is transacted by the more usual means of business communication.

While many dealers in over-the-counter securities are not members of the Exchange many of the member firms and corporations, including those involved here, do an extensive business in over-the-counter securities and unlisted municipal bonds. Private wire connections between over-the-counter securities dealers, who are not members of the Exchange, and member firms, facilitate transactions between them in unlisted securities and municipals, and also provide facilities by which customers of nonmember firms who desire to purchase or sell listed securities can have their orders transmitted to member firms for rapid execution.

2. *The parties.*

Petitioners are two broker-dealer firms, located in Texas, who deal largely in unlisted securities. Petitioner Municipal Securities ("Municipal"), a sole proprietorship, deals primarily in municipal bonds; petitioner Municipal Securities, Inc. ("Municipal, Inc.") handles primarily corporate securities. Both firms were organized by Harold J. Silver.² Neither

² Harold J. Silver died during the pendency of this case, and his widow, Evelyn B. Silver, as executrix of his estate, was substituted for him in the court of appeals (R. 251).

is a member of the Exchange. Both are registered as broker-dealers with the Securities and Exchange Commission under Section 15 of the Securities Exchange Act and, as such, are subject to the Commission's disciplinary authority. Both are also members of the National Association of Securities Dealers, Inc., an association of over-the-counter brokers and dealers registered with the Commission under Section 15A of the Act, which exercises disciplinary regulatory authority over its members (R. 204). The record indicates that petitioners enjoyed an excellent reputation with respect to their securities business, as indicated by letters of reference submitted to the Exchange by a number of prominent business institutions with which they had dealt (R. 31, 75, 211).

The respondent New York Stock Exchange ("the Exchange") is an unincorporated association registered with the Commission as a national securities exchange (R. 205). The 1375 authorized memberships in the Exchange are held by individuals (R. 203); there are also a large number of member firms (partnerships in which one of the general partners is an Exchange member), and member corporations (corporations in which one or more directors are Exchange members). The constitution and rules of the Exchange give it broad disciplinary powers over its members (R. 194-197). Rule 355, which is here involved, prohibits members or member organizations from maintaining any private wire or other communications system with any nonmember without the prior consent of the Exchange; and pro-

vides that the Exchange "may require at any time that any means of communication be discontinued" (R. 196-197). The rules provide no standards by which the Exchange will authorize or terminate such private communications.

3. *The Termination of Petitioners' Wire Services.*

As of February 1959, petitioners had had for some time private wire connections with the Dallas offices of various members of the Exchange and a private telemeter connection with the New York office of one Exchange member (R. 207-208). Municipal, Inc.'s wire connections with nine firms had been "temporarily approved" pursuant to applications which it made to the Exchange in June and October 1958 (R. 25).³ These wire connections were utilized to provide a network of rapid communications pertaining to orders primarily for unlisted securities (R. 26-27, 40-41, 205-206). These connections also enabled petitioners to place orders for listed securities; this was done as an accommodation for petitioners' customers and was important to petitioners' business, although the member firms through which the orders were executed received all fees in connection with these transactions (R. 41, 208). Municipal, Inc., also had a stockticker service supplied by the Exchange, which had been temporarily approved in July 1958; this service enabled Municipal, Inc. to get immediate quo-

³ Municipal also had wire connections with Exchange members. Application for approval of these connections had not been made either by it (apparently because Silver did not know it was required) or by the member firms involved (apparently through oversight) (R. 42, 125).

tations on transactions in listed securities directly from the floor of the Exchange (R. 207, 205).

On February 12, 1959, without notice to petitioners or explanation to its own member firms, the Exchange ordered its members to discontinue their wire connections with petitioners (R. 28). By March 2, 1959, each of the member firms "had complied with this directive and had severed all private wire and telemeter connections" with the petitioners (R. 208). The Exchange also terminated its ticker service with Municipal, Inc. (R. 208).

Attempts by petitioners to ascertain the reason for this action, and to answer any accusations upon which it might have been based, proved futile (R. 73, 74, 210). Silver personally visited the Exchange on February 16, 1959, and had an interview with Walter Coleman, the Assistant Director of the Exchange's Department of Member Firms. Silver told the latter that "his reputation has always been of the best," and that "he could think of no reason whatever, either personal, with respect to any of the officers or personnel, or with respect to the corporation itself, why the Exchange should feel it necessary to withdraw approval of a private wire and ticker" (R. 67). Coleman explained to Silver "the long standing policy of the Exchange about not giving reasons for any disapproval or withdrawal of approval action" (R. 67), "but he would give me no reason for the NYSE's action" (R. 29). Coleman advised Silver that "he was at liberty to request reconsideration" and suggested that, if he did so, he should obtain "qualitative letters of refer-

ence" from friends, business associates, etc. "in respect of his entire organization, including officers and personnel" (R. 67).⁴ Petitioners subsequently submitted to the Exchange letters of reference from "various of the member firms with whom plaintiffs had had connections, other securities dealers, Dallas banks and leading New York banks, [who] wrote * * * in substance that their business dealings with plaintiffs had been entirely satisfactory, that plaintiffs had an excellent reputation, and were considered to be responsible, of integrity and of good financial standing. The position of the Exchange remained unchanged" (R. 211).

On February 26, 1959, Silver wrote to G. Keith Funston, President of the Exchange, and Edward C. Werle, Chairman of its Board of Governors, that as a

⁴ Coleman's memorandum of the interview also stated (R. 68):

"He [Silver] asked whether it might expedite matters if he were to try a process of elimination in order to find out the reasons for the Exchange's recent action. For example, he suggested that he might disband his entire organization and just make application as an individual. If that were disapproved, he would know that he himself was an undesirable person as far as the Exchange was concerned, even though there might be other undesirables connected with his organization. If we approved tickers and wires, for him as an individual, he then would add officers or personnel one at a time, and 'wait to see if anything happened' as far as the Exchange is concerned. He asked whether the Exchange would look with favor upon such a procedure, and I told him in my personal opinion the reaction would be unfavorable.

"He said that the other alternative was to do a lot of leg work and paper work in the line of character references, and he felt that this was an almost futile task. However, he indicated that he would follow through along these lines."

result of the Exchange's action "irreparable damage" was being inflicted on the financial condition and reputation of the firm and its 26 employees (R. 71, 72). Silver stated (R. 72):

I appeal to your sense of justice and ask for the following: (1) Temporary reinstatement of the services, (2) that we be advised of the reasons for the action of the New York Stock Exchange, and (3) that we be given an opportunity to answer any charges and present whatever information you may require.

Mr. Funston replied on March 4, 1959, as follows (R. 73):

Thank you for writing to me about your problem.

While I can understand your position in wanting to know specific reasons for the recent action taken by the Exchange in connection with private wire and ticker service to your organization, I am sure you can also understand our position in declining to furnish such details.

Before taking any such action, the Exchange always makes a very careful and very thorough investigation.

I have personally reviewed the scope and results of such investigation in this case, and feel that the Exchange acted properly.

Mr. Werle's response advised Silver that (R. 74):

As a matter of long standing policy, the Exchange does not furnish detailed reasons for its action in either approving or disapproving private wires or ticker service for non-members.

The district court found (R. 210):

All efforts by Silver to obtain reasons or explanations from the Exchange or an opportunity to meet any charges which had been made against him were met with categorical refusal. * * *

4. *The proceedings below.*

On April 6, 1959, petitioners filed this suit against the Exchange for injunctive relief and damages (R. 35). The complaint (R. 1-12) alleged that the termination and denial of wire services by the Exchange and its members (who were named as co-conspirators) constituted a concerted refusal to deal, in violation of Section 1 of the Sherman Act; and that the withdrawal of the stock ticker violated Sections 1 and 2 of that Act.⁵

In affidavits submitted in connection with pre-trial proceedings and in opposition to petitioners' motion for partial summary judgment (see below), the Exchange revealed for the first time its reasons for terminating petitioners' wire connections. It gave four reasons for its action: (1) that, pursuant to its Industrial Personnel Security Program, the Defense Department in 1953 had suspended the security clearance of Mr. and Mrs. Silver and of Intercontinental Mfg. Co., a government contractor with which they were

⁵ The complaint also alleged, as separate causes of action, tort claims based on the Exchange's inducing its members to breach their contracts with petitioners for wire connections, and its allegedly wrongfully injuring petitioners (R. 9-12). The district court has not ruled upon these claims, and they are not involved in the case before this Court.

associated (R. 35);⁶ (2) that it had obtained "other" "information believed to be derogatory to the Silvers," which it declined to reveal (R. 35, 98-99);⁷ (3) that the data which Silver submitted to the Exchange in connection with the applications for wire services had failed to list the names of two companies (but not Intercontinental) with which he had been associated; and (4) that Silver had sold shares of stock in U.S. Hoffman Machinery Corporation (received as a result of its merger with Intercontinental) two months after stating in writing that he had "no present intention" to sell such stock (R. 96-97, 214-215).

On April 26, 1960, petitioners moved for partial summary judgment and for a preliminary injunction (R. 15-16). In an accompanying affidavit, Silver stated that since February 13, 1959 (the date of termination of the wire services) the businesses of both Municipal and Municipal, Inc., had "steadily deteriorated"; that "[e]fforts to stem this tide" by Municipal, Inc., were "unsuccessful" and it ceased to exist as a

⁶ Four months after the Exchange had terminated petitioners' wire services, this Court held in *Greene v. McElroy*, 360 U.S. 474, that the Industrial Personnel Security Program was invalid. On August 23, 1960, the Defense Department, in accordance with the *Greene* decision, vacated and expunged from its records the revocation of the Silvers' security clearance (R. 231).

⁷ Respondent refused to reveal such allegedly derogatory information to petitioners unless they agreed not to sue the Exchange, its investigative agencies or its informants for defamation. When petitioners refused to do so, the Exchange offered to reveal the material to the court *in camera*, but without disclosing it to petitioners, but the court declined to receive it on that basis. (R. 214.)

functioning organization by October, 1959; and that the Exchange's action "not only reduced MSC's [Municipal's] gross profits more than fifty percent during 1959, but it caused a reduction in the total number of MSC's employees from seventeen on February 13, 1959, to seven by January 1, 1960. But this steady attrition of MSC's business and of its organization could be halted or deterred if NYSE member-firms are permitted to take independent action to restore or establish wire connections with MSC" (R. 37).

The district court (Judge Bryan) granted partial summary judgment for petitioners on the claim relating to private wire connections.* The court ruled that the Exchange's actions "will cause loss and damage to these plaintiffs in the future" (R. 234), and enjoined the Exchange "from preventing, prohibiting or interfering with the establishment, maintenance and operation of private wire and telemeter connections between plaintiffs and defendant's member firms and member corporations for the purpose of trading or otherwise dealing, or communicating with respect to transactions, in over-the-counter securities, municipal bonds, or securities not listed for trading on the New York Stock Exchange." (R. 239-240.)^o The court rejected the Exchange's claim that its action

* The court held that the claim that the Exchange had violated Sections 1 and 2 of the Sherman Act by terminating its ticker service with Municipal, Inc. raised issues of fact that precluded decision of the question on a motion for summary judgment (R. 234-238).

^o The court also concluded that the Exchange was liable for such damages as petitioners could prove at trial (R. 233).

was immune from the antitrust laws (R. 216-224). The court further held that, absent such immunity, the termination of private wire services by the member firms was a concerted refusal to deal which was a *per se* violation of the Sherman Act (R. 224-229). The court considered and rejected each of the four grounds relied on by the Exchange as justification for its actions (R. 229-233), and concluded that the Exchange had acted "arbitrarily and unreasonably in directing that plaintiff's wire connections be severed" (R. 233).

Respondent appealed the order granting injunctive relief,¹⁰ and a divided court of appeals reversed, holding that while

* * * [i]t is quite clear that there would be, at the very least, a grave doubt as to the legality of the action of the defendant if it is not insulated from liability under the Sherman Act * * * [w]e hold * * * that the action of the Exchange in bringing about the cancellation of the private wire connections with members of the Exchange was within the general scope of the authority of the Exchange as defined by the 1934 act and therefore outside the coverage of the Sherman Act. [R. 258.]

Judge Waterman dissented on the ground that the court's decision conferred upon the Exchange a "significant privilege to which I believe no statute entitles

¹⁰ Respondent also sought to appeal under 28 U.S.C. 1292(b) from the portion of the district court's judgment adjudging it liable for whatever damages petitioners could establish, but the court of appeals denied leave to appeal on that issue (R. 249).

it," and because "as applied to the facts in this case, there is no clear repugnancy between the Securities Exchange Act of 1934 and the Sherman Act, which requires the blanket exemption from the antitrust law" found by the majority (R. 268-271).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the reconciliation of two broad and important, although sometimes conflicting, sets of statutory policies. On the one hand, there is the policy of the antitrust laws favoring the preservation and protection of competition in our economy in its broadest scope. On the other hand, there is the policy of the Securities Exchange Act of 1934 placing upon the nation's registered securities exchanges the duty of insuring that their members observe "just and equitable principles of trade." The problem arises from the fact that, in carrying out their statutory obligations, the exchanges and their members may be required to take concerted action to discipline members which, unless immunized by the Securities Exchange Act, might violate the Sherman Act.

No case involving the clash of such important statutory objectives—and particularly not the first case before this Court—can be decided without careful analysis of the underlying policy considerations involved, and we shall therefore develop such considerations in some detail. On the other hand, while these policies are necessarily extremely broad, their very breadth, and the possible distinctions that might be drawn in applying them to different situations, strongly dictate against attempting to reach any broad

or sweeping conclusions as to the general scope of any immunity the exchanges may have for actions taken in the exercise of their statutory function of self-regulation. Here, as in so many areas of the law, the precise scope of any immunity must be developed by the process of case-by-case adjudication.

The problem of the exchanges' antitrust immunity may rise in two different contexts. The first situation—which is not presented by, and therefore need not be resolved in this case—is where the exchange promulgates a particular rule, and the validity of the rule itself is challenged before the Commission as inconsistent with the statutory standards because of its anticompetitive consequences. (See p. 29, *infra*, for discussion of the Commission's authority to review the rules of an exchange.) In reviewing an exchange rule, the Commission considers the policies of the antitrust laws. See *In the Matter of the Rules of the New York Stock Exchange*, 10 S.E.C. 270, 286; *In the Matter of National Association of Securities Dealers, Inc.*, 19 S.E.C. 424, 433. The Securities Exchange Act may contemplate that the validity of such a rule should be determined in the first instance by the Commission, but questions as to the Commission's authority to approve a rule which it is alleged violates the standards of the antitrust laws, or as to the effect of such approval, need not be faced or decided in this case.¹¹

¹¹ While neither the Securities Exchange Act nor the Commission's rules of practice specifically authorize the filing of a complaint with the agency by a person adversely affected by a rule of an exchange, the Commission would ordinarily

For in the present case, as we view it, the primary challenge is not to the rule itself, but [REDACTED] rather to the validity of its application in a particular instance.¹² The precise issue before the Court is whether the Exchange has absolute immunity against liability under the antitrust laws for the damage inflicted upon the petitioners by directing its members to terminate petitioners' direct wire connections, even though the Exchange's action was not based upon a reasonable investigation and was an arbitrary and irrational conclusion from the known facts. We think that the answer to this question must be negative, and that no more should be decided in this case.

In the argument that follows we will show that there is nothing in the basic statutory scheme of the Securities Exchange Act which justifies an absolute immunity from the antitrust laws. On the contrary, settled principles governing the scope of implied antitrust immunity dictate against such a broad exemption. There will be no violation of the statutory plan for self-regulation if an exchange is denied absolute

entertain such a complaint if it made substantial allegations.

¹² Petitioners challenge the rule as improper because it would authorize arbitrary action (Br. 2, 17-20). We assume (see, *infra*, p. 43) that the Exchange was acting in the view that the promotion of just and equitable principles of trade required Exchange members to refrain from having direct wire connections with non-member firms lacking the integrity and reliability necessary in the securities business. We think that there can be no objection to such a standard of conduct under a system of self regulation.

antitrust immunity for arbitrary or unreasonable action in cutting off wire connections of a nonmember, since imposing antitrust liability for such conduct will not interfere with the attainment of "just and equitable principles of trade" in securities transactions.

ARGUMENT

I

APART FROM ANY IMMUNITY PROVIDED BY THE SECURITIES EXCHANGE ACT OF 1934, THE ACTION OF THE EXCHANGE IN DIRECTING ITS MEMBER FIRMS TO SEVER WIRE CONNECTIONS WITH THE PETITIONERS VIOLATED SECTION 1 OF THE SHERMAN ACT

Unless the action of the Exchange in terminating petitioners' wire services is immunized from the anti-trust laws by the Securities Exchange Act of 1934 (and, as we show in Point II, *infra*, it is not), it plainly violated Section 1 of the Sherman Act.

In the absence of immunity, the securities business, like every other form of interstate trade and commerce, is of course subject to the Sherman Act. *United States v. South-Eastern Underwriters Association*, 322 U.S. 533; *United States v. National Association of Real Estate Boards*, 339 U.S. 485; cf. *United States v. Morgan*, 118 F. Supp. 621 (S.D. N.Y.).

The New York Stock Exchange is an unincorporated association, each of whose members agrees upon

joining "to comply with the directives issued by the Exchange pursuant to its constitution and rules" (R. 224). Under the constitution, failure to comply with such directives subjects a member to disciplinary action, including possible expulsion (Art. XIV, Sec. 6, R. 195). The constitution gives the Board of Governors the power to approve or disapprove any application for wire or other communications connections between any member and nonmember, and the Board "may require the discontinuance of any such * * * connection (Art. III, Sec. 6, R. 194-195). Similarly, the rules of the Exchange prohibit any wire or other communications connection between members and nonmembers without the prior consent of the Exchange, and provide that "The Exchange may require at any time that any means of communication be discontinued" (Rule 355, R. 196-197).

In the present case, it is conceded that the member firms terminated petitioners' wire connections only after the Exchange had directed them to do so, and obviously because of that instruction. The termination thus constituted a concerted refusal to deal with the petitioners by the Exchange and its member firms. As the district court explained (R. 225-226):

The effect of this combination was to bar the member firms named as co-conspirators from exercising their freedom to carry on trade and commerce with these plaintiffs according to their own choice and discretion. They have placed restraints upon their own liberty of action and have foreclosed themselves from exercising their own independent business judg-

ment with respect to their dealings with these plaintiffs. They are limited in such dealings by the dictates of the combination which has substituted its business will and judgment for their own. * * *

* * * * *

It is not necessary to show that the combination prohibited all dealings between the member firms involved and the plaintiffs, as the Exchange seems to contend. The effect of the Exchange directive to the members of the combination was to foreclose them from dealing with the plaintiffs by means of the private wire connections which were a normal means of doing business in over-the-counter and unlisted municipal securities. The combination operated to deprive plaintiffs of a means of doing business which was of substantial value to them in the conduct of their business. The very nature of the business in which plaintiffs were engaged makes this abundantly plain. This means of doing business was available to others who did not fall within the proscription directed against plaintiffs. There were numerous other non-member broker/dealers in Dallas, and in other parts of the country, who maintained such private wire connections with member firms and continued to use them.

Such an organized boycott or concerted refusal to deal is ordinarily illegal *per se* under Section 1 of the Sherman Act. *Klor's v. Broadway-Hale Stores*, 359 U.S. 207; *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457. Even if the Exchange as an organized exchange for public trading

in securities can claim a right to be governed by less strict rules (cf. *Chicago Board of Trade v. United States*, 246 U.S. 231), the action of the Exchange in this case runs afoul of the principle that when a private group has control over access to a market—and a trading exchange is a classic example of such power—the antitrust laws require it to accord access to that market, on an equitable and nondiscriminatory basis, to all those in the trade. This principle has been applied to require access to railroad terminal facilities through which rail traffic flowed across the Mississippi River at St. Louis, *United States v. Terminal R.R. Ass'n*, 224 U.S. 383; to an association with monopoly power over newsgathering, *Associated Press v. United States*, 326 U.S. 1; to a produce exchange building, *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 194 F. 2d 484 (C.A. 1), certiorari denied, 344 U.S. 817; to a tobacco market, *American Federation of Tobacco Growers v. Neal*, 183 F. 2d 869 (C.A. 4); to a fish market, *United States v. New England Fish Exchange*, 258 Fed. 732 (D. Mass.); and to a livestock market, cf. *Anderson v. United States*, 171 U.S. 604, 618–619. It is no less applicable to the present case, where the respondent has denied petitioners access to the facilities of a stock exchange “which were a normal means of doing business in over-the-counter and unlisted municipal securities” and which were “of substantial value to them in the conduct of their business” (R. 226); and thereby denied the petitioners “the opportunity to do business with the members of the Exchange upon the same terms and conditions as

others in the over-the-counter and municipal securities markets in which they were engaged" (R. 225).

II

THE SECURITIES EXCHANGE ACT DOES NOT PROVIDE ANTI-TRUST IMMUNITY FOR THE EXCHANGE'S ACTIONS IN THIS CASE

The Securities Exchange Act of 1934 contains no explicit antitrust immunity for actions taken by registered securities exchanges. An immunity will therefore be implied only if there is a clear repugnancy between the 1934 Act and the antitrust laws, and, since it is not to be implied lightly (*California v. Federal Power Commission*, 369 U.S. 482, 485), any such immunity is limited to the extent of the repugnancy. *Id.*, at 485-486; *United States v. Borden Co.*, 308 U.S. 188, 198; *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-457.

The court of appeals in effect held that the provisions of the 1934 Act requiring registered exchanges to insure that their members observe "just and equitable principles of trade" were repugnant to, and hence by implication provided immunity from, Section 1 of the Sherman Act. Its rationale was that subjecting the exchanges to liability under the Sherman Act for actions taken in the purported performance of their statutory duty to regulate their members might deter them from properly performing that duty. As a consequence, the court held, the Securities Exchange Act must be read as conferring upon the exchanges what the dissenting judge described

(R. 271) as a "blanket exemption" from the antitrust laws for any action taken "within the general scope of the[ir] authority * * * as defined by the 1934 Act," even though in a particular case the action of the Exchange might be "arbitrary or unreasonable" (R. 258, 267).

There is nothing in either the legislative history or the general plan of the 1934 Act, however, which even suggests that Congress intended to confer such sweeping antitrust immunity upon private groups. Such an immunity would require a showing that the entire system of self-regulation by the exchanges is basically incompatible with the standards of the Sherman Act. As we show below, there is no such basic inconsistency between the two statutes, and there is accordingly no basis for implying the sweeping antitrust immunity found by the court of appeals.

The history and language of the Act themselves strongly indicate that Congress did not intend to create any antitrust immunity so sweeping as to cover the present case. For at the time the Act was passed, it was established that securities and other exchanges were subject to suit under federal and State antitrust laws for excluding or discriminating against nonmembers.¹³ It is most unlikely that

¹³ See Meyer, *The Law of Stockbrokers and Stock Exchanges* (Baker, Voorhis & Co., 1931), Sec. 4; *Anderson v. United States*, 171 U.S. 604; *Ertz v. Produce Exchange Co.*, 82 Minn. 173; *State ex rel. Hadley v. Kansas City Live Stock Exchange*, 211 Mo. 181; *Pirnie, Simons & Co. v. Whitney*, 144 N.Y. Misc. 812, 259 N.Y. Supp. 193 (Sup. Ct., N.Y. County). See the federal antitrust cases on access to markets cited at p. 22, *supra*.

Congress, in imposing federal regulatory controls upon the exchanges, simultaneously intended to eliminate such private rights of action. Indeed, Section 28(a) of the Act (15 U.S.C. 78bb) provides for the continuation of such suits, since it states that "[t]he rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity * * *."

To be sure, there may be situations in which an exchange, in order effectively to perform its function of regulating its members, may be required to take action against a member which might otherwise violate antitrust standards and, to that extent, antitrust immunity may properly be implied for actions by the exchange. But such an immunity would be far narrower than the broad immunization conferred by the court of appeals for any action, however arbitrary or unreasonable, taken by the exchange "within the general scope of [its] authority * * * as defined by the 1934 Act * * *" (R. 258), or "within the scope of its statutory authority in the enforcement of its rules * * *" (R. 264). Such an immunity is not ordinarily extended even to public officials.

A. REGISTERED SECURITIES EXCHANGES HAVE, AT MOST, A QUALIFIED PRIVILEGE FOR ACTIONS TAKEN WITHIN THE GENERAL SCOPE OF THEIR AUTHORITY AS DEFINED IN THE SECURITIES EXCHANGE ACT.

1. *The statutory scheme of the Securities Exchange Act of 1934.*

(a) The Securities Exchange Act of 1934 provided an extensive federal regulatory system for the securi-

ties business. Although the exchanges themselves had previously endeavored to eliminate abuses in the business, government regulation was needed because such self-regulation had proven inadequate. As President Roosevelt explained, in proposing the 1934 legislation, "the managers of these exchanges have, it is true, often taken steps to correct certain obvious abuses" but, to "be certain that abuses are eliminated," "a broad policy of national regulation is required" (S. Rep. No. 792, 73d Cong., 2d Sess., p. 2; H. Rep. No. 1383, 73d Cong., 2d Sess., p. 2).

The Senate Report explicitly discussed "Inadequacy of Self-Regulation of Exchanges." It pointed out that governmental regulation had always been resisted by stock exchanges "on the ground that they are sufficiently able to regulate themselves to afford protection to investors" (S. Rep. No. 792, 73d Cong., 2d Sess., p. 4). The Committee rejected, as "unsound," the contention "that internal regulation obviates the need for governmental control," because, among other reasons (*id.* at 4-5):

* * * the attitude of exchange authorities toward the nature and scope of the regulation required appears to be sharply at variance with the modern conception of the extent to which the public welfare must be guarded in financial matters. Their adherence to the view that manipulation, pool activities, and the creation of illusory "price mirages" are proper and legitimate, except where certain technical violations of their rules are involved, is inconsistent with the type of regulation the public interest demands.

The manipulation of the so-called "repeal stocks" on the New York Stock Exchange during the summer of 1933 illustrates the ineffectiveness of self-regulation. * * * The inability of the stock exchange authorities even to discover the flagrant abuses unearthed by the committee indicates that a Federal regulatory body could deal with such practices more effectively than the exchanges themselves.¹⁴

While Congress thus recognized in the 1934 Act the need for governmental control, it also provided, as an integral part of the regulatory system, for continuation and strengthening of self-regulation by the exchanges. 2 Loss, *Securities Regulation* (2d ed., 1961), pp. 1175-1178, 1180-1182; H. Rep. No. 1383, 73rd Cong., 2d Sess., p. 15.

(b) The 1934 Act contains a number of provisions designed to insure vigorous and effective self-regulation by the exchanges. Section 6 (15 U.S.C. 78f) provides for the registration of exchanges with the Securities and Exchange Commission, and Section 5 (15 U.S.C. 78e) prohibits, with certain exceptions, the use of the facilities of unregistered exchanges.

Section 6(a) provides that the registration statement must include an agreement by the exchange "to comply, and to enforce so far as it is within its powers compliance by its members" with the Act and the Commission's rules and regulations there-

¹⁴ The abuses which the Exchange Act was intended to meet are summarized in Tracy & MacChesney, *The Securities Exchange Act of 1934*, 32 Mich. L. Rev. 1025, 1027-1036.

under. Section 6(b) requires that the rules of a registered exchange must include

provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this chapter or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

Section 6(d) provides for registration if it appears to the Commission that the exchange is so organized as to be able to comply with the Act and the rules thereunder, and that its rules "are just and adequate to insure fair dealing and to protect investors."

The registration requirements thus not only impose upon an exchange the duty of enforcing compliance by its members with the statute and the Commission's rules thereunder, but affirmatively require the exchange to insure that its members observe "just and equitable principles of trade" and engage in "fair dealing" so as to "protect investors." As the court of appeals correctly ruled (R. 263), reaffirming its earlier decision in *Baird v. Franklin*, 141 F. 2d 238 (C.A. 2), certiorari denied, 323 U.S. 737, "the Act makes it the duty of the Exchange to enforce the rules which it is required to file with the Commission." In the *Baird* case, the court ruled that an exchange may be liable for damages resulting from failure to enforce its rules.

Section 19 (15 U.S.C. 78s) gives the Commission both disciplinary and supervisory powers over registered exchanges which are designed, among other

things, to insure proper performance by the exchanges of their regulatory responsibilities. Thus, Section 19(a) authorizes the Commission, when it believes it to be "necessary or appropriate for the protection of investors," to suspend or withdraw the registration of any exchange if it has violated the Act or Commission rules "or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon"; and to suspend or expel any member or officer of an exchange who has violated the Act or its rules or who "has effected any transaction for any other person who, he has reason to believe, is violating in respect of such transaction" the Act or Commission rules.

Section 19(b) permits the Commission itself to make changes in the rules of an exchange. If an exchange refuses to make specified changes requested by the Commission, the latter, if it determines that such changes are "necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange," may alter or supplement the rules of the exchange with respect to specified subjects.¹⁵

¹⁵ Section 19(b) provides that the Commission may make changes in the rules of an exchange "in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading;

(c) The scope of self-regulation by the securities industry was significantly broadened in 1938 by the so-called Maloney Act, which added Section 15A to the Act (15 U.S.C. 78o-3, 52 Stat. 1070). This section dealt primarily with the over-the-counter market.¹⁵ Section 15A(b) provides for Commission registration of associations of brokers and dealers who may or may not be members of a registered exchange. Such an association must have rules "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, and, in general, to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market," and "not

(5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters."

¹⁵ The legislative history indicates that self-regulation of this segment of the industry was intended not only to lighten the Commission's enforcement problems, but also to "control * * * ethical practices in this business, which is not a field which the Government can very well occupy." Testimony of Commissioner Mathews in Hearings on S. 3255 before the Senate Committee on Banking and Currency, 75th Cong., 3d Sess., p. 10 (1938).

designed to permit unfair discrimination between customers or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule of prices, or to impose any schedule or fix minimum rates of commissions, allowances, discounts, or other charges." Section 15A(b)(7). The rules may provide, however, that no member may deal with nonmembers "except at the same prices, for the same commissions or fees, and on the same terms and conditions as are by such members accorded to the general public." Section 15A(i)(1).¹⁷ The rules must also provide for disciplining of members for violation thereof and for "a fair and orderly procedure" with respect thereto. Section 15A(b)(8) and (9).

Unlike the provisions dealing with registered exchanges, however, which do not provide for Commission review of disciplinary actions against their members, Section 15A specifically provides for review by the Commission of disciplinary actions by such associations. Section 15A(g) and (h). Such Commission action is, in turn, subject to judicial review. 15 U.S.C. 78y. Finally, Section 15A(n) provides that Section 15A is to prevail over "any provision of any law of the United States in force on June 25, 1938" with which it conflicts.

Only one association of over-the-counter brokers and dealers has registered with the Commission: the

¹⁷ The effect of this provision, as the Commission has pointed out, is that it is "virtually impossible for a dealer who is not a member of the NASD [an association of brokers and dealers] to participate in a [securities] distribution of important size." *In the Matter of National Association of Securities Dealers, Inc.*, 19 S.E.C. 424, 441.

National Association of Securities Dealers, Inc.
("NASD").

2. The pertinent public policy considerations.

In determining whether, and to what extent, the foregoing statutory program provides an implied immunity for registered exchanges, because of its repugnancy to the antitrust laws, two competing public interest considerations are of primary significance: (a) the importance of preserving the effectiveness of the statutory system of self-regulation, and the extent to which imposing antitrust liability would weaken such system; and (b) the danger of possible misuse of the exchange's regulatory powers to accomplish anticompetitive objectives. The latter danger may be minimized to the extent that the Securities Exchange Act provides a remedy for redressing wrongful action by an exchange.

(a) *The importance of preserving the effectiveness of self-regulation.*—Self-regulation by the exchanges today plays a vital role in the policing of securities markets and in the development of high ethical standards and practices in the securities business. No adequate substitute for the protection of the investing public is readily available. Detailed Commission control of every phase of the activities of exchanges and their members would not only involve an expansion of the Commission's organization and operations to a degree which Congress regarded as impractical if not undesirable, but would also run counter to the concept of achieving through self-regulation even higher

standards than those which might be imposed by statute.¹⁸

To some degree self-regulation may be weakened by the application of concepts of *per se* liability under the antitrust laws which were evolved for the purpose of suppressing anticompetitive combinations without inquiry into alleged justifications therefor in particular cases. Self-regulation necessarily involves concerted adherence by the members of the exchange to standards and restrictions evolved in the self-regulatory process and requires concerted action by exchange members to make effective the sanctions imposed to secure compliance. In addition, Commission supervision of self-regulatory activities may, and frequently does, involve a weighing of alternatives and of perhaps conflicting objectives in the context of particular practices and problems.¹⁹

¹⁸Pertinent to this concept is the Congressional testimony of former Commissioner Mathews in relation to similar provisions for self-regulation of the over-the-counter market contained in the Maloney Act. Commissioner Mathews said:

[E]ven if the funds were furnished for a direct government regulatory program, and even if an adequate staff were provided, and even if there were no problems of securing enforcement through the courts in any cases that you and I would agree there should be enforcement in, a great many of the abuses in the securities business are not matters of definite illegality; they are matters of ethics.

• • • There is a vast field for the control of ethical practices in this business, which is not a field which the Government can very well occupy. [Hearings on S. 3255, Senate Committee on Banking and Currency, 75th Cong., 3d Sess., p. 10.]

¹⁹In so doing, one of the factors considered by the Commission is the impact of rules and practices upon competition. See fn. 27, 28, and pp. 46-47, *infra*.

An exchange and its members may be reluctant to act vigorously in disciplining erring members if they are subject to possible antitrust liability should it ultimately turn out that they went beyond the bounds of permissible regulatory action in the particular case. The same policy underlies the privileges the law has always accorded public officials. In some instances, it is absolute; thus, government officials have absolute immunity for defamatory statements made in the course of their official duties, so that they "should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties." *Barr v. Matteo*, 360 U.S. 564, 571, see *Spalding v. Vilas*, 161 U.S. 483, 498-499, and Judge Learned Hand's opinion in *Gregoire v. Biddle*, 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949. This was apparently the rationale of the court of appeals in this case, which cited *Gregoire v. Biddle* for its statement that "[i]n the exercise of the powers which they are required by the statute to exercise the exchanges must be immune from prosecution under other legislation" (R. 267). In other instances, even public officials enjoy only a qualified privilege. *E.g.*, *Restatement of Torts*, §§ 121, 143, 146, 147, 196, 204.

To draw the analogy to the absolute privilege of government officials emphasizes the critical distinction between such cases and the present one. For the nation's stock exchanges are not governmental agencies, but private regulatory bodies exercising, under the general supervision of the Commission, regulatory

functions which ordinarily are exercised only by the government itself—and without the protections against arbitrary action which customarily accompany the exercise of such power by the government (see *infra*, pp. 38-39, 41-42, 48-49). On the other hand, the fact that the exchanges are non-governmental organizations is not conclusive proof that no privilege was intended to accompany the obligation of self-regulation. Private persons are often given privileges in the public interest. In an earlier day, private citizens were not liable for destroying property in the path of a fire where necessary to save larger portions of a city, if they acted in the reasonable belief that the destruction was necessary.²⁰ Similarly, a private citizen has a qualified privilege to make arrests,²¹ and to abate what he reasonably believes to be a public nuisance.²² Although the analogies are not exact, these familiar precedents may be helpful in determining the extent to which a privilege ought to accompany the duties under the Securities Exchange Act which it is in the public interest to have the exchanges perform.

(b) *The danger of misuse of the exchange's regulatory authority.*—To hold that the Securities Exchange Act gives exchanges absolute immunity from the antitrust laws—and, perhaps, by the same token,

²⁰ Restatement of Torts, § 196; Harper and James, *The Law of Torts* (1956), § 1.16.

²¹ Restatement of Torts, § 119; 143; Harper and James, *The Law of Torts* (1956), § 3.18.

²² Restatement of Torts, § 201, 203.

from other liability as well (see page 40, *infra*)—for all action “within the general scope of the[ir] authority * * * as defined by the 1934 Act” (R. 258), would open the door to three dangers:

(1) There is a wide field of action in which the antitrust laws remain the only restraints upon misconduct by a securities exchange. The exchanges’ duty to insure “just and equitable principles of trade” does not authorize them to control all competitive relationships between exchange members and nonmembers. Nor was the regulatory scheme of the 1934 Act designed to facilitate the restriction or elimination of competition in the securities business. On the contrary, as the Commission itself has recognized, “one of the declared purposes” of the Act is the “fostering” of competition among exchanges and between the exchanges and the over-the-counter market—“a purpose which is closely related to the public policy” of the antitrust laws.²³ The standards of conduct which the Act requires the exchanges to foster among their members are comprehended by the terms “just and equitable principles of trade” (Section 6(b)), “fair dealing” (Section 6(d)), and “protect[ion of] inves-

²³ *In the matter of the Rules of the New York Stock Exchange*, 10 S.E.C. 270, 286-287. The Commission there invalidated a rule of the respondent providing for suspension or expulsion of any member who publicly dealt for his own account on another exchange in securities listed on another exchange. This was the only case in which the Commission ever exercised its power under Section 19(b) to “alter or supplement” the rules of an exchange.

tors" (Section 6(d)). While the Act does not define these generalized terms, both their statutory context and the abuses against which the Act was directed (see *supra*, pp. 26-27) show that they refer to the ethical standards of the securities business. In particular, the phrase "just and equitable principles of trade" was understood in the industry, at the time the Act was passed, as relating to ethical standards.²⁴ The 1938 Maloney Act used the same words in defining the conduct which associations of brokers and dealers were to promote (see *supra*, p. 30), and a Commission member testified at the hearings on those amendments that the phrase referred to "matters of ethics" and "ethical practices in the business."²⁵ The

²⁴ *E.g.*, *In re Haebler v. New York Produce Exchange*, 149 N.Y. 414, 44 N.E. 87 (1896) (conduct in violation of morals and commercial honor and integrity); *Dickenson v. The Chamber of Commerce of the City of Milwaukee*, 29 Wisc. 45 (1871) (something more than purely legal obligation, but violated by a member's breach of contract); see *In the Matter of National Association of Securities Dealers, Inc.*, 19 S.E.C. 424, 484-485.

²⁵ Commissioner Mathews stated that the phrase "conduct * * * inconsistent with just and equitable principles of trade" covered abuses which "are not matters of definite illegality; they are matters of ethics. * * * There is a vast field for the control of ethical practices in this business, which is not a field which the Government can very well occupy. * * * An association of this sort, if it is successful, must be able to control those practices of its members which, in the language of the stock exchange rule, are inconsistent with just and equitable principles of trading." Commissioner Mathews characterized this concept as including "methods of doing business, which while not technically illegal, are nevertheless unfair to customer and decent competitor alike, and are seriously damaging to the mechanism

Commission's own decisions similarly recognize that the phrase connotes ethical standards.²⁴

The existence of the wide area in which there is no conceivable occasion for giving the exchanges an immunity from antitrust prosecution or civil liability is the strongest evidence that the Securities Exchange Act does not confer a blanket immunity under the antitrust laws. Furthermore, it is apparent that there must be some authority other than the exchanges themselves with power to draw the line between actions which constitute proper self-regulation and those which amount to a forbidden attempt to control the competitive relationships between members and non-members. See p. 45, *infra*.

(2) An absolute immunity would also permit the exchanges, under the cover of merely regulating "ethical" practices, to engage in conduct which was actually designed to, and did, suppress competition among exchange members, or between such members and non-members. For example, under the guise of disciplining its own members, an exchange might regulate access to, and conduct upon, the over-the-counter markets by nonmembers, many of whom compete directly with the exchange and its members for trade in listed and unlisted securities. See *In the Matter of the*

of the free and open market." (Hearings on S. 3255, Senate Committee on Banking and Currency, 75th Cong., 3d Sess. (1938), pp. 10-11, 16.)

²⁴ See, e.g., *Samuel B. Franklin Co.*, Securities Exchange Act Release No. 5603 (Nov. 18, 1957), p. 5; *In the Matter of Lerner & Co.*, 37 S.E.C. 850 (1957); *In the Matter of National Association of Securities Dealers, Inc.*, 19 S.E.C. 424 (1945).

Rules of the New York Stock Exchange, 10 S.E.C. 270, 286.²⁷ The claim that anticompetitive devices are being utilized only to eliminate improper practices and raise ethical standards in an industry is no novelty in antitrust litigation, but all too frequently the “unethical” conduct sought to be eliminated turns out to be the vigorous competition which the antitrust laws are designed to stimulate and protect. See, *e.g.*, *Sugar Institute v. United States*, 297 U.S. 553, 599; *Fashion Originators’ Guild v. Federal Trade Commission*, 312 U.S. 457; *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 489.

(3) The obverse of every immunity or privilege may be unredressed injury to the victim. To the extent that a registered exchange is given immunity for action that it erroneously supposed to be necessary to promote just and equitable principles of trade, some broker or dealer who has been denied access to the market will suffer loss without compensation for what otherwise would be an actionable wrong. The injury may result from any one of numerous causes—malice, arbitrariness, carelessness or a justifiable mis-

²⁷ In that case (discussed *supra*, note 23), the Commission modified a disciplinary rule of the respondent, applicable to members, which would have injured other competing exchanges. Although not dealing explicitly with the power of exchanges, but only with the propriety of the rule, the Commission indicated the danger of abuse in exchange rule-making and stated disapprovingly that the Exchange was seeking to regulate the conduct of its members on that Exchange as well as their conduct on other exchanges of which they were members. 10 S.E.C. 270, 286.

take of fact. Although many familiar privileges have exactly this consequence, the extent of a new privilege or immunity cannot be fairly defined without balancing the need against the danger of uncompensated loss to innocent victims.

The court of appeals suggested that even though the Act gave the Exchange an absolute immunity under the antitrust laws, petitioners were not "without a remedy" against "arbitrary or unreasonable" action by the Exchange. The court did not specify what that remedy might be. The statute creates none. We know of no doctrine that creates a special statutory remedy against a non-governmental organization that abuses the powers of self-regulation granted by a federal statute. It would seem that, apart from the Sherman Act, any action would have to be brought in tort for a conspiracy to interfere with petitioner's advantageous business relations with member firms. In such an action petitioners would undoubtedly be met with the very defense that is offered here—that the harm, if any, was *damnum absque injuria* because the Exchange is granted an absolute immunity by the Securities Exchange Act concomitant with the statutory duties imposed. There is nothing in that Act which distinguishes between liability under the Sherman Act and liability in tort. To the extent that a privilege or immunity is necessary to facilitate action by the exchanges to perform their regulatory duties, immunity from one form of liability is as necessary as immunity from the other. If it be said that liability under the Sherman Act is espe-

cially harsh, the answer is that this is partly because the remedy is especially effective. There is no reason to suppose that Congress would have wished to wipe out the effective remedies while leaving those that were inadequate.

(c) *Remedies under the Securities Exchange Act.*—The availability or unavailability of remedies under the Securities Exchange Act is a relevant consideration in determining whether Congress intended that Act to confer broad antitrust immunity. The claim of an absolute immunity might have somewhat greater appeal if the statute provided some alternative method for correcting arbitrary disciplinary action by an exchange. Under the 1934 Act, however, the Commission cannot review the application of the rules of an exchange in a particular case (although it may “alter or supplement” particular rules themselves, see Section 19(b), n. 15, *supra*, p. 29). The lack of any provision for Commission review of disciplinary actions by the exchanges is in sharp contrast to the Maloney Act, which specifically provides for Commission review of disciplinary action by associations of brokers and dealers. Section 15A(g) and (h). Commission action thereon is in turn subject to judicial review. Section 25. The Commission on occasion has reversed disciplinary actions by the N.A.S.D. See, e.g., *In the Matter of National Association of Securities Dealers, Inc.*, 19 S.E.C. 424.²⁸

²⁸ In that case the NASD had imposed penalties on certain members for breaching a provision in an underwriting agreement requiring them to observe fixed prices in selling the underwritten securities to the public. Such breach of contract,

The provisions for Commission and judicial review of disciplinary action by the NASD afford its members protection against illegal or arbitrary action by their organization. Such right of review presumably was a significant factor in the Congressional determination specifically to provide that the Maloney Act is to prevail over any conflicting law in force on the date of its enactment.²⁹ The absence of similar provisions for Commission or judicial review of particular disciplinary actions by the exchanges, together with the lack of any specific immunity provision for such actions, is strong evidence that Congress intended that disciplinary actions by the exchanges, like those of other private groups, should continue, at least to some degree, to be subject to the antitrust laws. Cf. *United States v. Morgan*, 118 F. Supp. 621, 697 (S.D. N.Y.), where Judge Medina relied on the immunity provision of the Maloney Act in ruling that the provisions of

the NASD held, was "conduct inconsistent with just and equitable principles of trade." The Commission set aside the NASD's action, on the ground that the Association rule under which the NASD had acted did not authorize the disciplining of members for violating price-maintenance provisions in underwriting agreements. 19 S.E.C. at 444.

²⁹ This provision (Section 15A(n)) does not in terms provide antitrust immunity, and the legislative history does not indicate that it was specifically intended to do so. It has nevertheless been interpreted as conferring some measure of antitrust immunity. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 227, n. 60; *International Association of Machinists v. Street*, 367 U.S. 740, 809, n. 16 (dissenting opinion of Mr. Justice Frankfurter); *In the Matter of National Association of Security Dealers, Inc.*, 19 S.E.C. 424, 478, n. 9 (dissenting opinion of Commissioner Healy); 2 Loss, *Securities Regulation* (2d ed., 1961) 1370.

the 1934 Act (other than the Maloney Act) do not "amount to an implied exemption, in whole or in part, from the provisions of the Sherman Act."

3. *A securities exchange does not have an absolute immunity from liability under the Sherman Act for causing its members to cut off wire service from a non-member firm.*

While the rule under which the Exchange acted contains no standards (see *supra*, pp. 7-8) and the Exchange made no findings, we assume that the Exchange's action was based upon its determination that petitioners were so lacking in integrity and reliability that termination of their wire connections with Exchange members was required to carry out the Exchange's self-regulatory functions under the Act. See R. 94-95, 177-180, 187. We return now to the central issue in the instant case—whether the Exchange has an absolute immunity against liability under the Sherman Act for such action, when its determination was made without reasonable investigation and was also an arbitrary and irrational inference from the known facts.

The Exchange's action was within the general area of its responsibilities under the Securities Exchange Act. An exchange's regulatory authority and duty are not limited to transactions on the exchange, but also extend to members' transactions and relationships with nonmembers who operate in the over-the-counter market. We disagree with petitioners' contention (Br., pp. 22-27) that the separate statutory scheme under Section 15A for regulating brokers and dealers in the over-the-counter market shows that an exchange's

regulatory authority does not extend to controlling its members' relationships with nonmembers operating in that market. Although Section 15A imposes the *primary* responsibility for regulating the over-the-counter market upon the NASD, under the supervision and review of the Commission, this does not establish that an exchange can never take disciplinary action against its members because of their business dealings with nonmembers. True, in most instances the appropriate agency for dealing with improper practices in the over-the-counter market is the NASD. But the broad regulatory responsibilities of an exchange require it to police its members' business dealings both on and off the exchange, in listed as well as in unlisted securities. An exchange must also regulate actions by its members in concert with, or on behalf of, nonmembers; it is a ground for expulsion of an exchange member by the Commission that he "has effected any transaction for any other person who, he has reason to believe, is violating the Act or Commission regulations 'in respect of such transactions'" (Sec. 19(a)(3)). The statutory injunction that exchange rules must insure "fair dealing" and "protect investors" (Sec. 6(d)) reflects a congressional intention that the exchanges should regulate all conduct by their members which may adversely affect the interests of investors, even though such members may not be directly or consciously responsible for any wrongdoing. Thus, there may be cases—although this is not one—in which an exchange may be justified in requiring its members to take action affecting conditions in the over-the-counter market.

Apart from the point just mentioned, there is no challenge here to the standard of conduct that the Exchange was apparently attempting to apply. Although the only formal rule of the Exchange was that requiring that private wire connections between members and non-members be approved by the Exchange and terminated upon its direction, still it appears that the Exchange in this instance was applying a standard of integrity and reliability. The termination of members' wire connections with brokers and dealers who lack integrity and reliability is certainly conducive to the promotion of member conduct consistent with just and equitable principles of trade. The absence of any challenge to the standard of conduct that the Exchange was enforcing obviates the necessity for a ruling upon how and where the decision is to be made when an Exchange rule is attacked either as unrelated to the promotion of the just and equitable principles of trade, or as an unreasonable method for achieving the end. To put the case at bar in perspective, however, we point out that some machinery for making such decisions is essential, other than the exchange itself; otherwise the exchanges would be free to restrain competition in areas quite unrelated to their regulatory duties. For example, if an exchange were to adopt a rule forbidding its members to furnish wire service to any broker or dealer who sold listed securities outside the exchange, someone would have to decide whether this rule was unlawful under the Sherman Act or privileged as necessary to promote just and equitable principles of trade.

One possibility is that the question must be tried out in litigation under the Sherman Act; and in that event it might well be argued that the rule that trade boycotts are unlawful *per se* should be inapplicable because otherwise the exchanges could exert no regulatory power. Self-regulation necessarily involves concerted adherence by the members of the exchange to standards and restrictions evolved in the self-regulatory process, and requires concerted action by exchange members to make effective sanctions imposed to secure compliance therewith. The question would become whether the restraint was reasonable in the light of its alleged tendency to promote just and equitable principles of trade. To answer the question the court would not only be required to define the scope of the term "just and equitable principles of trade" but might find it necessary to balance any beneficent tendency of the rule to promote the objectives against any restrictive effect upon competition.

Alternatively, the Securities Exchange Act might be construed as giving the Commission power to make the final decision upon such questions, subject to such judicial review as the Act may provide. Under Section 6 the rules promulgated by an exchange must be filed with the Commission, and Section 19(b) gives the Commission authority to "alter or supplement" particular rules. The court below concluded that any rule not disapproved by the Commission must be deemed approved by it and cannot be challenged in litigation under the antitrust laws. The Commission is aware of its responsibility in the administration of the securities laws to achieve a reasonable accommoda-

tion or balance between the salutary purposes of those laws and the antitrust laws, and it points out that the supervision of self-regulatory activities does involve weighing of alternatives and of perhaps conflicting objectives in the context of particular practices and problems. The Commission believes that as a matter of governmental policy the Commission, the agency designated by Congress to supervise the securities industry, including the exchanges, in the public interest, is the logical agency to make determinations in this area—especially because the interjection of antitrust procedures and doctrines at the behest of private litigants or indeed of other agencies of government could seriously impair the ability of the Commission, as an independent agency, to exercise its supervisory functions under the Act.

There are strong arguments against this view. It would give an administrative agency, whose attention is focussed upon one set of objectives and which is subject to one set of pressures, unprecedented power to grant exemptions from laws designed to preserve competition without any statutory indication that Congress intended to delegate the power to immunize. Exemptions and power to grant antitrust immunity are not lightly implied. *California v. Federal Power Commission*, 369 U.S. 482. Furthermore, one may question the fairness or efficacy of a procedure that makes an exchange's rules binding unless the Commission chooses to scrutinize and to alter or suspend them, perhaps without judicial review. Accordingly, we take no position upon this question, but strongly urge the Court to pretermitt the issue as a question not raised by the present case.

Moreover, since the primary claim here is that the Exchange's procedure was unfair and its conclusions were arbitrary and capricious because lacking any adequate factual basis, any presumed Commission approval of the Exchange's regulations is utterly irrelevant. The rules merely provide that no exchange member may maintain any wire connection with any nonmember without the prior consent of the Exchange, and that the Exchange may at any time require that any means of communication be terminated, but without specifying any standards for Exchange action (R. 196-197). Furthermore, in reviewing such rules the Commission plainly does not, and indeed, could not, evaluate either the more particular standards or the procedures which an exchange may later follow in administering the rules. The minimum price of Commission approval—assuming that it carries immunity—would seem to be full disclosure of the precise meaning and detailed application of the rules. For example, approval of a bare rule that requires Exchange approval of private wire connections with non-members could hardly be supposed, without further disclosure, to approve cutting off wire service to non-members who traded in listed securities outside the Exchange, because the Exchange concluded that all trading in listed securities should be through its facilities. *A fortiori* the Commission cannot be supposed to give advance blessing to an undisclosed procedure and allegedly capricious conclusions in particular instances occurring long after the rule was promulgated. And the Commission has no authority to pass judgment upon the manner in which an exchange administers its rules.

Accordingly, if there is to be any scrutiny of such challenges to an exchange's activities in applying its rules to particular cases, an action must lie for damages or equitable relief.

Confining ourselves here and in all the discussion that follows exclusively to cases involving the application of a particular lawful standard—such as that of integrity and reliability—to a particular case, we urge that there is no need to grant the absolute immunity for unfair procedure and arbitrary and capricious determinations provided by the court below. There is no basis for supposing that such sweeping immunity is necessary to encourage the exchanges vigorously to carry out their disciplinary responsibilities, or that they will be reluctant or unwilling to do so unless they enjoy an immunity even for “arbitrary or unreasonable” (R. 267) actions. We know of no instance in which the law provides so sweeping an immunity for private groups, and we submit that one should not be provided unless there is a clear indication that Congress so intended. In the present case the most that can be said is that the self-regulatory scheme for exchanges impliedly authorizes them to take certain concerted action which, were it not for the regulatory scheme, would violate the Sherman Act. The need for some measure of immunity to carry out their regulatory responsibilities affords no basis for implying to Congress the intention to permit them complete immunity whenever they purport to be exercising that authority.

On the other hand, we think it unfair and a serious deterrent to the statutory policy of encouraging self-regulation to hold that an exchange is liable in dam-

ages for mere mistakes of judgment after a reasonable investigation. The law commonly gives a privilege to those who act reasonably in pursuit of a recognized interest even though a judge or jury later finds them to be wrong. *E.g., Restatement of Torts*, §§ 119, 143, 147, 196, 204. In our view, when an exchange is applying to a particular case a rule which is admittedly, or has authoritatively been determined to be, within the permissible limits of regulatory action, it is not liable if its action was taken in good faith and had a reasonable factual foundation. Such a privilege, we believe, is a necessary and appropriate concomitant of the statutory duties imposed.³⁰

To come within the privilege two conditions must be satisfied:

(1) Prior to acting, the exchange must have taken reasonable steps to ascertain all the facts. What is reasonable will depend upon the circumstances, but

³⁰ This case does not raise any question as to whether the Exchange may continue to require its members to cut off wire service from a nonmember when its investigation was reasonable and reasonable conclusions were drawn from the evidence, but the nonmember is able to demonstrate that the Exchange in fact was wrong. Two ways of dealing with this problem are available. First, it might be held that since the question of whether cutting off the nonmember would tend to promote just and equitable principles of trade is committed to the Exchange, there is no room for judicial review of its findings of fact which have reasonable support. On the other hand, it might be concluded that while the Exchange needs immunity from liability in damages to facilitate its undertaking the task of self-regulation, this policy does not apply to injunctive relief and there is therefore no reason why the court should not make its own determination.

We note that although public officials have certain immunity from damage liability for acts done in their official capacity (see *supra*, pp. 34-35), they may nevertheless sometimes be subject to injunction to reverse their actions. See *Larson v. Domestic & Foreign Commerce Corp.*, 377 U.S. 682, 690-691, 702.

a reasonable investigation would ordinarily include conducting a thorough inquiry, giving the nonmember a statement of the reasons why the services are proposed to be terminated, and affording him an appropriate opportunity to answer and refute the charges.

(2) The conclusions (in terms of the authorized standards) which the exchange draws from the facts before it, including those developed both by it and by the nonmember, must be reasonable.

Where both of these conditions are met—an adequate investigation by the agency and reasonable conclusions drawn from the facts there developed—then, but only then, the action of the exchange in terminating the wire connections is privileged.

An example may make the standard clearer. Suppose an exchange receives hearsay reports that a nonmember, with whom some of its members have wire connections, is using such connections to obtain information which he, in turn, uses to defraud the public. If, without more, the exchange were then summarily and permanently to terminate the wire connections, we do not think that its action would be privileged.³¹ For while a reasonable belief that a nonmember was using wire services to aid in defrauding the public would ordinarily justify the conclusion that termination of such services was necessary to promote "just and equitable principles of trade," the mere receipt of such reports by the exchange would not be enough, without further investigation, to warrant the exchange in taking the drastic

³¹ Whether a temporary suspension pending further inquiry would be privileged is a more difficult question that might depend upon details concerning the circumstances.

remedy of cutting off the nonmember's services. If, however, a careful investigation by the exchange substantiated the reports it had received, and if the nonmember failed to submit any countervailing material, then the exchange's termination of such wire services would be privileged. It would not lose such privilege if it subsequently should develop that the facts were otherwise, and that in actuality the nonmember was not really defrauding the public at all.

The test which we have suggested—limited, as we have indicated, to the particular narrow issue before the Court—would, we believe, provide the exchanges with a sufficient degree of flexibility and protection to enable them properly to perform their duties. Conversely, the public interest in protecting nonmembers against possibly arbitrary action by the exchange in terminating these vital wire services dictates that, unless the exchange has made reasonable efforts to ascertain fully the facts in a particular case, and unless its action appears reasonable in relation to those facts, it cannot properly claim a privilege for such actions. It plainly is not entitled to an absolute privilege merely because its actions are “within the scope of its statutory authority in the enforcement of its rules” (R. 264), and without regard to whether such action is “arbitrary or unreasonable” in the particular case (R. 267).

B. THE ACTION OF THE EXCHANGE IN DIRECTING ITS MEMBER FIRMS TO SEVER WIRE CONNECTIONS WITH THE PETITIONERS IS NOT IMMUNE FROM THE ANTITRUST LAWS

Since the court of appeals held that the Exchange had an absolute immunity, it did not consider whether

the Exchange's action would be immune under the narrower standard we have suggested. If this Court agrees with us as to the governing standard, the normal practice would be to remand the case to the court of appeals for reconsideration under that standard. However, since the district court fully analyzed (but rejected) the reasons given by the Exchange in justification of its actions, and since the record is a short one, this Court might deem it appropriate itself to decide whether the Exchange has antitrust immunity for terminating petitioners' wire connections. Cf. *O'Leary v. Brown-Pacific-Maxon*, 340 U.S. 504, 508. We shall therefore briefly set forth the reasons why we believe the Exchange's claim of antitrust immunity cannot be sustained in this case.

1. *The Exchange's procedures in this case were arbitrary.*

In the present case, the Exchange gave petitioners no advance notice of, or explanation for, its termination of their wire services. All attempts by petitioners to ascertain the reasons therefor, and to meet any charges that might have been made against them, fell on deaf ears. See the Statement, *supra*, pp. 9-12. The Exchange presented no facts which even suggested that such summary action on its part was necessary to protect investors against any immediate threat; on the contrary, all of the grounds upon which the Exchange subsequently attempted to justify its conduct involved incidents that had taken place substantial periods before it acted.

Furthermore, while the Exchange stated (R. 97) that it had made an investigation of petitioners, the

thoroughness of such investigation seems open to question. With respect to one of the four grounds upon which the Exchange based its action—the charge that Silver had made a misstatement in connection with the acquisition of certain stock (see *infra*, pp. 55–56)—the district court found (R. 230) that had the Exchange first checked with the Securities and Exchange Commission, it would have discovered that Silver had submitted a statement to the Commission which exculpated him.

In sum, the court of appeals properly characterized the Exchange's procedure in this case as "arbitrary" (R. 267). The use of such an arbitrary procedure destroys any immunity claim which the Exchange otherwise might have.

2. *The Exchange Did Not Have Reasonable Grounds for Its Conclusions.*

Not only were the Exchange's procedures in this case arbitrary, but none of the four grounds upon which the Exchange relied justified the conclusion that termination of petitioners' wire services was necessary to insure "just and equitable principles of trade" because petitioners lacked integrity and reliability relevant to the securities business. (a) Since the Exchange has never revealed the alleged derogatory information about Silver, it is impossible to know whether such information would justify its action. (b) The fact that the Defense Department had revoked the security clearance of Silver and certain companies with which he was then connected was not, of itself, sufficient to establish that Silver was not

a suitable person for the securities business; there are grounds for revoking security clearance quite unrelated to a man's personal character. Indeed, the district court found (R. 231) that, at the time the Exchange took its action against petitioners it had no knowledge of the grounds upon which the Defense Department's action was based. (c) As to Silver's failure to state, in his application to the Exchange, the names of two corporations with which he had been associated, the district court found that there was nothing which contravened Silver's claim that these omissions were inadvertent or which showed "that there was anything wrong with these corporations or anything remotely improper with Silver's connection with them" (R. 231). Although the test is whether the Exchange acted reasonably upon the information before it, the omission, even standing alone, was too insubstantial a basis. (d) With respect to the charge that Silver had stated in writing when he acquired stock of the U. S. Hoffman Machinery Company³² that he had no intention of selling it but that two

³² The extent to which the Exchange relied on this incident is unclear. The assistant director of the Exchange's Department of Member Firms testified on deposition (R. 113):

Q. Did any of the reasons for the Exchange's disapproval action have to do with securities transactions?

A. Not directly. I think I explained to you in previous questioning—possibly I didn't—there were certain areas of information which were not in themselves a basis for the action, but which very possibly might have been considered had there not been, in our opinion, sufficient basis without them.

Q. Are you referring to the transactions in the stock of U.S. Hoffman Manufacturing Company?

A. Yes.

months later he began to sell it (R. 97, 230), the district court correctly ruled that there was "no merit to the claim that these facts indicate that the Silvers were untrustworthy." As the court noted, had the Exchange first checked with the Securities and Exchange Commission, it would have found that Silver had submitted material to the Commission in justification of the sale which showed "that the Silvers did not act in bad faith either in the statements made at the time of acquisition or in making the sales" (R. 230).

The district court reviewed the grounds on which the Exchange sought to justify its action (R. 229-233), and found as an "inescapable conclusion" that the Exchange had acted "arbitrarily and unreasonably in directing that plaintiffs' wire connections be severed" (R. 233). The court of appeals did not disturb that finding (R. 267). For the foregoing reasons we think the finding correct.

Plainly, the claimed grounds for the Exchange's action provide no reasonable basis for a conclusion that petitioners might violate the law, or that member firms might, by maintaining wire connections with petitioners, themselves engage in conduct in securities transactions "inconsistent with just and equitable principles of trade," or unwittingly become involved in unfair dealing or conduct detrimental to investors. To the contrary, the record shows that firms of national repute having business relations with petitioners advised the Exchange that petitioners enjoyed a good reputation in the securities business. Thus the Chase-Manhattan Bank, in a letter which the district court described as "representative of

letters sent to the Exchange" concerning the business reputation of petitioners, advised the Exchange (R. 211):

It is our pleasure to write to you in behalf of the Municipal Securities Company in Dallas, Texas. While this firm is not a depositor of ours, it has been well and favorably known to us for some time.

Our Bond Department has had transactions with the Municipal Securities Company in the form of municipal underwriting, syndicate and dealing operations which were always handled in an exemplary manner by the subject. Several of the principals are personally known to us and are considered to be men of ability and integrity.

In short, we have a high regard for both the firm and its management, and are pleased to commend them to you as proper and responsible parties with which to have business dealings.

The record provides yet another reason why the Exchange cannot link its severance of petitioners' wire connections to the prevention of misconduct by members in securities transactions or their involvement in improper activities of nonmembers. The Exchange did not forbid its members from all dealing with petitioners; it permitted such business to continue, but under conditions which disadvantaged petitioners vis-à-vis competitors who continued to maintain private wire connections with respondent's members (R. 31-34, 43-44, 100, 169-172, 173, 226-227, 233). In such circumstances, the Exchange cannot claim that its ac-

tion against petitioners was designed to protect its members from *dealing* with people who were themselves likely to engage in improper securities transactions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

DANIEL M. FRIEDMAN,
Assistant to the Solicitor General.

JANUARY 1963.

APPENDIX

The pertinent provisions of the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. 78a, *et seq.*, are as follows:

Necessity for Regulation as Provided in This Title

SECTION 2. For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions:

(1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in which the exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate com-

merce, and directly affect and influence the volume of interstate commerce; and affect the national credit.

(2) The prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold, the amount of certain taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and the value of collateral for bank loans.

(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.

(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is

put to such great expense as to burden the national credit.

* * *

Transactions on Unregistered Exchanges

SECTION 5. It shall be unlawful for any broker, dealer, or exchange, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce for the purpose of using any facility of an exchange within or subject to the jurisdiction of the United States to effect any transaction in a security, or to report any such transaction, unless such exchange (1) is registered as a national securities exchange under section 6 of this title, or (2) is exempted from such registration upon application by the exchange because, in the opinion of the Commission, by reason of the limited volume of transactions effected on such exchange, it is not practicable and not necessary or appropriate in the public interest or for the protection of investors to require such registration.

Registration of National Securities Exchanges

SECTION 6. (a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this title, and any amendment thereto and any rule or regulation made or to be made thereunder;

(2) Such data as to its organization, rules of procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the rules of the exchange"; and

(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

(c) Nothing in this title shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this title and the rules and regulations thereunder and the applicable laws of the State in which it is located.

(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this title and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate

notice and opportunity for hearing, denying registration as a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration.

* * * * *

Over-the-Counter Markets

SECTION 15 [as amended, 49 Stat. 1377-*et seq.*]. (a) No broker or dealer (other than one whose business is exclusively intrastate) shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, unless such broker or dealer is registered in accordance with subsection (b) of this section.

(b) A broker or dealer may be registered for the purposes of this section by filing with the Commission an application for registration, which shall contain such information in such detail as to such broker or dealer and any person directly or indirectly controlling or controlled by, or under direct or indirect common

control with, such broker or dealer, as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors. Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission or within such shorter period of time as the Commission may determine.

* * * * *

The Commission shall, after appropriate notice and opportunity for hearing, by order deny registration to or revoke the registration of any broker or dealer if it finds that such denial or revocation is in the public interest and that (1) such broker or dealer whether prior or subsequent to becoming such, or (2) any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), or any person directly or indirectly controlling or controlled by such broker or dealer, whether prior or subsequent to becoming such, (A) has willfully made or caused to be made in any application for registration pursuant to this subsection or in any document supplemental thereto or in any proceeding before the Commission with respect to registration pursuant to this subsection any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact; or (B) has been convicted within ten years preceding the filing of any such application or at any time thereafter of any felony or misdemeanor involving the purchase or sale of any security or arising out of the conduct of the business of a broker or dealer; or (C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security; or (D) has willfully violated any provision of the Securi-

ties Act of 1933, as amended, or of this title, or of any rule or regulation thereunder. * * *

SEC. 15A [As added in 1938 by the Maloney Act, 52 Stat. 1070 (15 U.S.C. 78o-3)]. (a) Any association of brokers or dealers may be registered with the Commission as a national securities association pursuant to subsection (b), or as an affiliated securities association pursuant to subsection (d), under the terms and conditions hereinafter provided in this section, by filing with the Commission a registration statement in such form as the Commission may prescribe, setting forth the information, and accompanied by the documents, below, specified:

(1) Such data as to its organization, membership, and rules of procedure, and such other information as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors; and

(2) Copies of its constitution charter, or articles of incorporation or association, with all amendments thereto, and of its existing bylaws, and of any rules or instruments corresponding to the foregoing, whatever the name, hereinafter in this title collectively referred to as the "rules of the association."

Such registration shall not be construed as a waiver by such association or any member thereof of any constitutional right or of any right to contest the validity of any rule or regulation of the Commission under this title.

(b) An applicant association shall not be registered as a national securities association unless it appears to the Commission that—

(1) by reason of the number of its members, the scope of their transactions, and

the geographical distribution of its members such association will be able to comply with the provisions of this title and the rules and regulations thereunder and to carry out the purposes of this section;

(2) such association is so organized and is of such a character as to be able to comply with the provisions of this title and the rules and regulations thereunder, and to carry out the purposes of this section;

(3) the rules of the association provide that any broker or dealer who makes use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security otherwise than on a national securities exchange, may become a member of such association, except such as are excluded pursuant to paragraph (4) of this subsection: *Provided*, That the rules of the association may restrict membership in such association on such specified geographical basis, or on such specified basis relating to the type of business done by its members, or on such other specified and appropriate basis, as appears to the Commission to be necessary or appropriate in the public interest or for the protection of investors and to carry out the purpose of this section;

(4) the rules of the association provide that, except with the approval or at the direction of the Commission in cases in which the Commission finds it appropriate in the public interest so to approve or direct, no broker or dealer shall be admitted to or continued in membership in such association, if (1) such broker or dealer, whether prior or subsequent to becoming such, or (2) any partner, officer, director, or branch manager of such broker or dealer

(or any person occupying a similar status or performing similar functions), or any person directly or indirectly controlling or controlled by such broker or dealer, whether prior or subsequent to becoming such, (A) has been and is suspended or expelled from a registered securities association (whether national or affiliated) or from a national securities exchange, for violation of any rule of such association or exchange which prohibits any act or transaction constituting conduct inconsistent with just and equitable principles of trade, or requires any act the omission of which constitutes conduct inconsistent with just and equitable principles of trade, or (B) is subject to an order of the Commission denying or revoking his registration pursuant to section 15 of this title, or expelling or suspending him from membership in a registered securities association or a national securities exchange, or (C) by his conduct while employed by, acting for, or directly or indirectly controlling or controlled by, a broker or dealer, was a cause of any suspension, expulsion, or order of the character described in clause (A) or (B) which is in effect with respect to such broker or dealer;

(5) the rules of the association assure a fair representation of its members in the adoption of any rule of the association or amendment thereto, the selection of its officers and directors, and in all other phases of the administration of its affairs;

(6) the rules of the association provide for the equitable allocation of dues among its members, to defray reasonable expenses of administration;

(7) the rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and

equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, and, in general, to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination between customers or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule of prices, or to impose any schedule or fix minimum rates of commissions, allowances, discounts, or other charges;

(8) the rules of the association provide that its members shall be appropriately disciplined, by expulsion, suspension, fine, censure, or any other fitting penalty, for any violation of its rules;

(9) the rules of the association provide a fair and orderly procedure with respect to the disciplining of members and the denial of membership to any broker or dealer seeking membership therein. In any proceeding to determine whether any member shall be disciplined, such rules shall require that specific charges be brought; that such member shall be notified of, and be given an opportunity to defend against, such charges; that a record shall be kept; and that the determination shall include (A) a statement setting forth any act or practice in which such member may be found to have engaged, or which such member may be found to have omitted; (B) a statement setting forth the specific rule or rules of the association of which any such act or practice, or omission to act, is deemed to be in violation, (C) a statement whether the acts or practices prohibited by such rule or rules, or the omission of any act required thereby, are deemed to constitute conduct

inconsistent with just and equitable principles of trade, and (D) a statement setting forth the penalty imposed. In any proceeding to determine whether a broker or dealer shall be denied membership, such rules shall provide that the broker or dealer shall be notified of, and be given an opportunity to be heard upon, the specific grounds for denial which are under consideration; that a record shall be kept; and that the determination shall set forth the specific grounds upon which the denial is based; and

(10) the requirements of subsection (c), insofar as these may be applicable, are satisfied.

* * * * *

(e) Upon the filing of an application for registration pursuant to subsection (b) or subsection (d), the Commission shall by order grant such registration if the requirements of this section are satisfied. If, after appropriate notice and opportunity for hearing, it appears to the Commission that any requirement of this section is not satisfied, the Commission shall by order deny such registration. If any association granted registration as an affiliated securities association pursuant to subsection (d) shall fail to be admitted promptly thereafter to affiliation with a registered national securities association, the Commission shall revoke the registration of such affiliated securities association.

(f) A registered securities association (whether national or affiliated) may, upon such reasonable notice as the Commission may deem necessary in the public interest or for the protection of investors, withdraw from registration by filing with the Commission a written notice of withdrawal in such form as the Commission may by rules and regulations prescribe. Upon the withdrawal of a national securities associa-

tion from registration, the registration of any association affiliated therewith shall automatically terminate.

(g) If any registered securities association (whether national or affiliated) shall take any disciplinary action against any member thereof, or shall deny admission to any broker or dealer seeking membership therein, such action shall be subject to review by the Commission, on its own motion, or upon application by any person aggrieved thereby filed within sixty days after such action has been taken or within such longer period as the Commission may determine. Application to the Commission for review, or the institution of review by the Commission on its own motion, shall operate as a stay of such action until an order is issued upon such review pursuant to subsection (h).

(h)(1) In a proceeding to review disciplinary action taken by a registered securities association against a member thereof, if the Commission, after appropriate notice and opportunity for hearing, upon consideration of the record before the association and such other evidence as it may deem relevant, shall (A) find that such member has engaged in such acts or practices, or has omitted such act, as the association has found him to have engaged in or omitted, and (B) shall determine that such acts or practices, or omission to act, are in violation of such rules of the association as have been designated in the determination of the association, the Commission shall by order dismiss the proceeding, unless it appears to the Commission that such action should be modified in accordance with paragraph (2) of this subsection. The Commission shall likewise determine whether the acts or practices prohibited, or the omission of any act required, by any such rule constitute conduct inconsistent with just and equitable principles of trade, and shall so declare. If it appears to the Com-

mission that the evidence does not warrant the finding required in clause (A), or if the Commission shall determine that such acts or practices as are found to have been engaged in are not prohibited by the designated rule or rules of the association, or that such act as is found to have been omitted is not required by such designated rule or rules, the Commission shall by order set aside the action of the association.

(2) If, after appropriate notice and opportunity for hearing, the Commission finds that any penalty imposed upon a member is excessive or oppressive, having due regard to the public interest, the Commission shall by order cancel, reduce, or require the remission of such penalty.

(3) In any proceeding to review the denial of membership in a registered securities association, if the Commission, after appropriate notice and hearing, and upon consideration of the record before the association and such other evidence as it may deem relevant, shall determine, that the specific grounds on which such denial is based exist in fact and are valid under this section, the Commission shall by order dismiss the proceeding; otherwise, the Commission shall by order set aside the action of the association and require it to admit the applicant broker or dealer to membership therein.

(i) (1) The rules of a registered securities association may provide that no member thereof shall deal with any nonmember broker or dealer (as defined in paragraph (2) of this subsection) except at the same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the general public.

(2) For the purposes of this subsection, the term "nonmember broker or dealer" shall include any broker or dealer who makes use of the mails or of any means or instrumentality of interstate commerce to effect any transaction

in, or to induce the purchase or sale of, any security otherwise than on a national securities exchange, who is not a member of any registered securities association, except a broker or dealer who deals exclusively in commercial paper, bankers' acceptances, or commercial bills.

(3) Nothing in this subsection shall be so construed or applied as to prevent any member of a registered securities association from granting to any other member of any registered securities association any dealer's discount, allowance, commission, or special terms.

(j) Every registered securities association shall file with the Commission in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, copies of any changes in or additions to the rules of the association, and such other information and documents as the Commission may require to keep current or to supplement the registration statement and documents filed pursuant to subsection (a). Any change in or addition to the rules of a registered securities association shall take effect upon the thirtieth day after the filing of a copy thereof with the Commission, or upon such earlier date as the Commission may determine, unless the Commission shall enter an order disapproving such change or addition; and the Commission shall enter such an order unless such change or addition appears to the Commission to be consistent with the requirements of subsection (b) and subsection (d).

(k)(1) The Commission is authorized by order to abrogate any rule of a registered securities association, if after appropriate notice and opportunity for hearing, it appears to the Commission that such abrogation is necessary or appropriate to assure fair dealing by the members of such association, to assure a fair

representation of its members in the administration of its affairs or otherwise to protect investors or effectuate the purposes of this title.

(2) The Commission may in writing request any registered securities association to adopt any specified alteration of or supplement to its rules with respect to any of the matters herein-after enumerated. If such association fails to adopt such alteration or supplement within a reasonable time, the Commission is authorized by order to alter or supplement the rules of such association in the manner theretofore requested if, after appropriate notice and opportunity for hearing, it appears to the Commission that such alteration or supplement is necessary or appropriate in the public interest or for the protection of investors or to effectuate the purposes of this section, with respect to:

(1) The basis for, and procedure in connection with, the denial of membership or the disciplining of members; (2) the method for adoption of any change in or addition to the rules of the association; (3) the method of choosing officers and directors; and (4) affiliation between registered securities associations.

(1) The Commission is authorized, if such action appears to it to be necessary or appropriate in the public interest or for the protection of investors or to carry out the purposes of this section—

(1) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to revoke the registration of a registered securities association, if the Commission finds that such association has violated any provision of this title or any rule or regulation thereunder, or has failed to enforce compliance with its own rules, or has engaged in any other activity tending to defeat the purposes of this section:

(2) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a registered securities association any member thereof who the Commission finds (A) has violated any provision of this title or any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was violating with respect to such transaction any provision of this title or any rule or regulation thereunder, or (B) has willfully violated any provision of the Securities Act of 1933, as amended, or of any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was willfully violating with respect to such transaction any provision of such Act or rule or regulation;

(3) after appropriate notice and opportunity for hearing, by order to remove from office any officer or director of a registered securities association who, the Commission finds, has willfully failed to enforce the rules of the association, or has willfully abused his authority.

(m) Nothing in this section shall be construed to apply with respect to any transaction by a broker or dealer in any exempted security.

(n) If any provision of this section is in conflict with any provision of any law of the United States in force on the date this section takes effect, the provision of this section shall prevail.

* * * * *

Powers With Respect to Exchanges and Securities

SECTION 19. (a) The Commission is authorized, if in its opinion such action is necessary

or appropriate for the protection of investors—

(1) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange if the Commission finds that such exchange has violated any provision of this title or of the rules and regulations thereunder or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon.

(2) After appropriate notice and opportunity for hearing, by order to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to withdraw, the registration of a security if the Commission finds that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder.

(3) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a national securities exchange any member or officer thereof whom the Commission finds has violated any provision of this title or the rules and regulations thereunder, or has effected any transaction for any other person who, he has reason to believe, is violating in respect of such transaction any provision of this title or the rules and regulations thereunder.

(4) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days.

(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such ex-

change effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters.

(c) The Commission is authorized and directed to make a study and investigation of the

rules of national securities exchanges with respect to the classification of members, the methods of election of officers and committees to insure a fair representation of the membership, and the suspension, expulsion, and disciplining of members of such exchanges. The Commission shall report to the Congress on or before January 3, 1935, the results of its investigation, together with its recommendations.

* * * * *

Effect on Existing Law

SECTION 28. (a) The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this title shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder.

(b) Nothing in this title shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between its members, or (2) with regard to the binding effect of such action on any person who has agreed to be bound thereby, or (3) with regard to the binding effect on any such member of any disciplinary action taken by the authorities of the exchange as a result of violation of any rule of the exchange, insofar as the action taken is not inconsistent with the provisions of this title or the rules and regulations thereunder.

The pertinent provisions of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, *et. seq.* are as follows:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

The pertinent provisions of the Clayton Act, 38 Stat. 731, 737, 15 U.S.C. 15, 26, are as follows:

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the

United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: * * *

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 150

HAROLD J. SILVER, d/b a
MUNICIPAL SECURITIES COMPANY,
and MUNICIPAL SECURITIES COMPANY, INC.,
Petitioners,
v.

NEW YORK STOCK EXCHANGE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

A. DONALD MACKINNON
1 Chase Manhattan Plaza
New York 5, New York
Attorney for Respondent

SAMUEL L. ROSENBERY
EDWARD J. REILLY, JR.
SQUIRE N. BOZORTH

Of Counsel

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 150

HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY,
and MUNICIPAL SECURITIES COMPANY, INC.,
Petitioners,

v.

NEW YORK STOCK EXCHANGE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Questions Presented

The principal issue is whether the responsibilities of the New York Stock Exchange (the Exchange) under the Securities Exchange Act of 1934 require immunity from the Sherman Act. In determining that issue, the following questions are presented:

1. Was the action of the Exchange in directing the discontinuance of private wires of its members with non-members taken pursuant to its responsibilities under the Securities Exchange Act?

2. Is the Exchange immune from the Sherman Act when acting pursuant to its responsibilities under the Securities Exchange Act?

3. Does immunity of the Exchange from the Sherman Act depend upon the reasonableness of its action?

Only if the Court concludes that the Exchange is not immune from the Sherman Act will it be necessary to consider whether the action of the Exchange was a *per se* violation. The resolution of that issue presents the following question:

4. Should action taken by the Exchange pursuant to its responsibilities under the Securities Exchange Act be judged without a full inquiry afforded by a trial?

STATUTES INVOLVED

The statutory provisions involved, in addition to those cited in the brief for the United States, are Sections 23(a) and 25(a) of the Securities Exchange Act of 1934. They are set forth at pages 36-37 of the appendix.

STATEMENT

Introduction

The Exchange is an unincorporated association registered as a national securities exchange with the Securities and Exchange Commission (the Commission) (R. 94). It provides a quality market for its members to trade in securities listed with the Exchange (*ibid.*). The prices at which listed securities are traded are determined by auction on the floor of the Exchange (R. 205).

Among the facilities of the Exchange is the continuous quotations service which furnishes current prices of listed securities (R. 185). Quotations are made available to non-members either by the stock ticker service carried over the facilities of the Western Union Telegraph Company or by private wires maintained by a non-member with one or more member firms (R. 185-86). Frequently, as in this case, a non-member will avail itself of both means of obtaining continuous quotations of listed securities (R. 39-40, 47-50).

Private wires with member firms also afford a non-member with a facility for transmitting orders to buy or

sell listed securities (R. 186) and, in many cases, may be used to effect transactions in unlisted securities (R. 206).

Many member firms also transact business as brokers and dealers in unlisted securities. The prices for unlisted securities are generally established by offers to buy and sell communicated between traders in the offices of brokers and dealers (R. 205-06).

The Nature of the Action

Municipal Securities Company (Municipal) was a sole proprietorship owned by Harold J. Silver (R. 17) who died on October 2, 1961. By order dated December 4, 1961, the executrix of Silver's estate was substituted as party plaintiff (R. 251). Municipal commenced business in 1955 and confined its activities primarily to transactions in municipal bonds (R. 2, 17). Municipal Securities Company, Inc. (Municipal, Inc.), a Texas corporation organized by Silver in 1958, was engaged in the business of purchasing and selling corporate stocks and bonds, both listed and unlisted (R. 3, 18, 24).

On April 6, 1959, Municipal and Municipal, Inc. commenced this action against the Exchange for treble damages of \$3,000,000, attorney's fees, costs and an injunction (R. 11-12, 35). The complaint sets forth three causes of action (R. 1-12). Only the first is here involved. It charges that in 1956 Municipal had private wires installed between its office and three member firms, and that such private wires were necessary for transacting business in unlisted securities (R. 2-3). It then alleges that Municipal, Inc. also arranged for private wires with certain member firms in order that its customers "could be apprised and informed as to the latest quotations of securities listed on the [Exchange] and by means of which [Municipal, Inc.] and its customers could purchase and sell securities listed on [the Exchange] on which quotations had been so obtained" (R. 3). It also alleges that Municipal, Inc. agreed with such member firms that it "would . . . transact business interstate with each of said member firms relative to the purchase and sale of securities listed on the [Exchange]" (R. 3-4).

Finally, it alleges that after the private wires were installed they were withdrawn pursuant to a conspiracy between the Exchange and the member firms, without just cause, and in violation of the Sherman Act (R. 7).

The Facts

In September, 1956, private wires were installed between Municipal and two member firms, one non-member firm and three banks (R. 22-23). In May, 1958, an additional private wire was installed between Municipal and a non-member which later became a member of the Exchange (*ibid.*). The Exchange's approval of Municipal's private wires with member firms was neither requested nor granted (R. 42-43).

In June, 1958, Municipal, Inc. made written application to the Exchange for approval of private wires with nine member firms, eight of which also requested the Exchange's permission to install such private wires (R. 24-25, 39-40, 47-50, 56). In the application Municipal, Inc. represented that it desired the private wires "by means of which [Municipal, Inc.] may obtain continuous quotations of the New York Stock Exchange" (R. 47-48) and agreed that the private wires and the furnishing of said quotations "shall be discontinued whenever [the Exchange] shall withdraw approval thereof" (R. 49).

Upon receipt of the application and other information required to be furnished by Municipal, Inc. concerning it and its officers (R. 51-53), the Exchange gave temporary approval, and the private wires between Municipal, Inc. and the offices of the member firms were installed (R. 25, 40, 96). Thereafter, the Exchange granted temporary approval of a telemeter connection between Municipal, Inc. and the office of another member firm (R. 27). Municipal, Inc. also had private wires with five non-member firms, one of which later became a member of the Exchange (R. 40).

In accordance with its usual practice, the Exchange had an investigation made of Municipal, Inc. and its officers by independent investigating agencies which it had used for many years and found to be well qualified and reliable (R. 97). The investigating agencies submitted reports

which disclosed, among other things, that the Defense Department had suspended the security clearance of the Silvers and of a corporation of which they had been officers, directors and substantial stockholders, and that their efforts to have the suspension vacated were unsuccessful (R. 97-98). The reports also disclosed that the Silvers had breached an agreement relating to the acquisition of certain shares of stock, and there were further disclosures of a derogatory nature bearing on the character and integrity of the Silvers (R. 97).

After carefully evaluating the reports, the Exchange decided to withdraw its temporary approval (R. 98). In February, 1959, without notifying Silver and in accordance with the conditions agreed to in the application, the Exchange directed the member firms to discontinue the private wires with Municipal, Inc. (*ibid.*). They did so (R. 69).

Shortly thereafter, Silver requested the Exchange to inform him of the reasons for its decision (R. 67, 71-72). The Exchange advised him that the decision was based upon a very careful and very thorough investigation and declined to disclose its reasons (R. 67, 73, 74). Although Silver then told the Exchange "that his reputation has always been of the best" (R. 67), his security clearance had been suspended on the grounds that he and Mrs. Silver had "intentionally and without authorization disclosed classified security information," that they had "willfully disregarded security regulations," that their "behavior, activities and associations tend to show that [they] are not reliable and trustworthy," and that they had "deliberately falsified facts and omitted to reveal certain material facts * * * to official representatives of the U. S. Navy and U. S. Air Force" (R. 97-98).

In March, 1959, at the suggestion of the Exchange (R. 67), Silver arranged to have several banks and member firms advise the Exchange that their dealings with plaintiffs had been satisfactory (R. 211). The Exchange caused a further investigation to be made and again reviewed its decision (R. 194). Three additional reports were obtained which confirmed the derogatory information the Exchange had previously received (*ibid.*).

During discovery proceedings the derogatory material was shown to Judge Bicks who ruled that it need not be disclosed to plaintiffs unless plaintiffs released the Exchange and its investigating agencies from any claims for defamation (R. 99). The Exchange's refusal to submit this material to Judge Bryan on the motion for summary judgment was based on the statement of plaintiffs' counsel in open court that an action would be commenced against the parties who furnished the information (R. 126).

The Decisions Below

The substance of the District Court's decision, so far as here material, is that the discontinuance by the member firms of the private wires pursuant to the Exchange's instructions was a concerted refusal to deal and illegal *per se* under Section 1 of the Sherman Act (R. 225-26). The District Court also held that the rule of reason did not apply and, even if it did, the Exchange would not be exonerated because it "acted arbitrarily and unreasonably in directing that plaintiffs' wire connections be severed" (R. 233). The basis of the District Court's conclusion that the Securities Exchange Act does not afford an exemption from the anti-trust laws is that the Exchange "is not entitled to regulate or control conduct of its members which does not concern the listed securities business which the Exchange carries on in pursuance of the only purpose for which it was established" (R. 223).

The Court of Appeals reversed (Judge Waterman dissenting) and stated there "is no justification in the Securities Exchange Act for drawing a distinction between the control which the Exchange is called upon to exercise over its members when they are dealing with listed securities and when they are dealing with other securities" (R. 264). In holding that the Exchange was immune from the Sherman Act, the majority concluded that the policy of the Securities and Exchange Act requires that the Exchange exercise fully its "disciplinary powers over members of the Exchange with respect to their transactions in over-the-

counter securities" (R. 266). They also stated that if immunity were dependent upon the reasonableness of a particular decision, the Exchange would understandably be reluctant to fulfill its statutory obligations, and held: "In the exercise of the powers which they are required by the statute to exercise the exchanges must be immune from prosecution under other legislation" (R. 267).

In remanding the case, the Court of Appeals pointed out that its holding "does not mean that if the action of the Exchange was arbitrary or unreasonable [plaintiffs] are without a remedy" as "judicial review is a necessary concomitant" of the exercise of power which is required of the Exchange by the Securities Exchange Act (*ibid.*).

Judge Waterman expressed his agreement with the decision of the District Court and stated that the Commission's "expertise does not involve matters of antitrust law, and it does not appear that Congress intended that the Commission was to be an overseer of the antitrust laws" (R. 271).

SUMMARY OF ARGUMENT

I

The Securities Exchange Act imposes upon the Exchange the responsibility of regulating its members' conduct in securities transactions. The Act contemplates that such regulation will be effected through enforcement of the Exchange's rules. The rules and all amendments thereto were required to be filed with the Commission and were found by the Commission to be just and adequate to insure fair dealing and to protect investors.

The rules filed with the Commission included those authorizing the discontinuance by the Exchange of private wires between its members and non-members. The criteria applied in enforcing such rules are the integrity and reliability of the non-member. Plaintiffs did not, in the Exchange's judgment, meet those criteria. The private wires were discontinued to assure a high standard of ethics and

promote conduct of members consistent with just and equitable principles of trade.

That plaintiffs were non-members engaged primarily in transactions in unlisted securities in no way diminishes the Exchange's statutory responsibilities. The United States acknowledges that "an exchange's regulatory authority and duty are not limited to transactions on the exchange, but also extend to members' transactions and relationships with non-members who operate in the over-the-counter market" (Br. 43).

II

In carrying out its responsibilities under the Securities Exchange Act, the Exchange should not be subjected to the civil and criminal penalties of the antitrust laws. If faced with the threat of such penalties, it would be severely handicapped in the performance of its duties. The Exchange could not be expected to make an objective appraisal of a situation that may require disciplinary action if exposed to treble damages, fines and imprisonment. Its responsibilities are comparable to those of a government agency and it should be accorded a corresponding immunity.

A further ground for immunity is the clear repugnancy between the Sherman and Securities Exchange Acts. The mandate of the Sherman Act is that each business entity make its own decisions as to the persons with whom it will deal. The Securities Exchange Act requires that the Exchange make those decisions for its members when necessary to promote conduct consistent with just and equitable principles of trade. The Exchange should not be held to have violated one federal statute for conduct required by another.

The Exchange's decision is, however, subject to review by the Commission which has the sole responsibility for supervision of the Exchange's enforcement of its rules. The Commission is authorized by statute to require the Ex-

change to make changes in its rules and practices and such changes include the manner of enforcing rules.

III

Immunity from the antitrust laws should not be conditioned upon the reasonableness of the Exchange's action. A decision made in good faith to carry out the legislative objectives should not be subjected to judicial scrutiny to ascertain whether, with the benefit of hindsight, it was unreasonable and, as a consequence, in violation of the antitrust laws.

The Exchange could not predict with sufficient certainty whether a court would agree it had acted reasonably in all cases. It would, in effect, be required to act at its peril and could not continue to meet as effectively its statutory obligations.

IV

Even if not immune from the antitrust laws, whether the Exchange violated such laws should be determined only after a full inquiry afforded by a trial. Merely labeling its conduct as a boycott is not sufficient to bring it within the absolute proscription of the *per se* rule. To do so would be to deny the Exchange the right to exercise any regulatory power over its members.

The Exchange's action differed substantially from the usual commercial boycott designed to eliminate competition or promote predatory activities. The Exchange should be afforded an opportunity to establish the characteristics peculiar to securities trading, the many problems confronted in meeting its statutory obligations, the uniform application of its standards, the importance of supervising its members with respect to their transactions in both listed and unlisted securities, and the necessity of discontinuing private wires to promote conduct consistent with just and equitable principles of trade. This could be done only at a trial.

ARGUMENT

I

The Exchange acted pursuant to its responsibilities under the Securities Exchange Act in directing the discontinuance of private wires of its members.

A. The Legislative Objectives

The objectives of the Securities Exchange Act are apparent from Section 2 which provides, in part, that

“transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto * * * and to impose requirements necessary to make such regulation and control reasonably complete and effective * * *.”

To accomplish those objectives, Congress could have entrusted the “regulation and control” entirely to the Commission. It decided, however, that the exchanges should have not only the authority but a concomitant responsibility to control their members’ conduct in all their securities transactions. This responsibility is not to be shared by the exchanges with anyone. It is only when an exchange fails to meet its responsibilities that the Commission is authorized to act in its place.

The report of the Dickinson Committee which formulated the plan for the regulation of securities transactions stated that the governmental agency to be created

“must be * * * so constituted as to place responsibility to the fullest extent possible on the private bodies now handling the work of security exchanges. * * * It seems distinctly better, in the opinion of your committee, to stimulate the exchange to further disciplinary activity by holding it to a high degree of accountability for the conduct of its members.” REPORT TO SECRETARY OF COM-

MERCE OF COMMITTEE ON STOCK EXCHANGE REGULATION,
SENATE COMMITTEE PRINT, 73d Cong., 2d Sess. 7, 8
(1934).

The Senate Report on the bill which became the Securities Exchange Act expressed the same view:

"Thus the initiative and responsibility for promulgating regulations pertaining to the administration of their ordinary affairs remain with the exchanges themselves. It is only where they fail adequately to provide protection to investors that the Commission is authorized to step in and compel them to do so." S. REP. NO. 792, 73d Cong., 2d Sess. 13 (1934).

The House Committee Report stated:

"Although a wide measure of initiative and responsibility is left with the exchanges, reserved control is in the Commission if the exchanges do not meet their responsibility. It is hoped that the effect of the bill will be to give the well-managed exchanges that power necessary to enable them to effect themselves needed reforms and that the occasion for direct action by the Commission will not arise." H. R. REP. NO. 1383, 73d Cong., 2d Sess. 15 (1934).

In expressing his views as to the relationship of the Commission to the exchanges, Mr. Justice Douglas, when Chairman of the Commission, said:

"My philosophy was and is that the national securities exchanges should be so organized as to be able to take on the job of policing their members so that it would be unnecessary for the Government to interfere with that business, and that they should demonstrate by action that they were so organized. Now, that is something more than cooperation. That is letting the exchanges take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope it would never have to be used." DOUGLAS, DEMOCRACY AND FINANCE 82 (1940).

More recently, Commissioner Cohen pointed out that "it is no accident that the federal securities laws have assigned to industry an important role in the development of appropriate standards of conduct. Subject to certain residual authority in the Commission, the national securities exchanges have a duty, under Sections 6 and 19 of the Securities Exchange Act, to provide rules and regulations concerning the operations of the exchange and its members." Address at Investment Bankers Ass'n of America Seminar, Oct. 25, 1962.

B. The Structure of the Act

Congress concluded that the most effective and desirable method for an exchange to control its members would be through the enforcement of its rules. As with the rules of the Commission, those adopted by exchanges and filed with and approved by the Commission are the keystone in the pattern of self-regulation established by Congress.

Section 5 of the Securities Exchange Act makes it unlawful to effect interstate transactions in securities through the facilities of an unregistered exchange. Section 6(a) specifies the conditions that an exchange must meet in order to register. In addition to filing all pertinent data with respect to its organization and existence, an exchange must agree to comply and to enforce compliance by its members with the Act, any amendments and any rule or regulation made thereunder. Section 6(b) requires that the rules of an exchange must include a provision for the expulsion, suspension or disciplining of members for conduct or proceeding inconsistent with just and equitable principles of trade. Section 6(c) authorizes an exchange to adopt and enforce rules that are consistent with the Act, the rules and regulations thereunder and the laws of the State where the exchange is located. Section 6(d) places the burden on the Commission to determine that the rules of an exchange are just and adequate to insure fair dealing and to protect investors and it is only after such a determination that an exchange may be registered.

Section 19(b) authorizes the Commission to make changes in the rules and practices of an exchange "for the

protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange" with respect to twelve specifically designated categories, including "the manner, method, and place of soliciting business; * * * the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange" and one general category entitled "similar matters."

When the Exchange applied for registration, it filed copies of its constitution and rules with the Commission which entered an order on September 28, 1934, finding that such rules were just and adequate to insure fair dealing and to protect investors. It was only then that the Commission approved the registration (R. 94).

C. The Rules Governing Private Wires

Among the rules filed with the Commission were those relating to the regulation by the Exchange of private wires between members and non-members. Article III, Section 6, of the constitution provides that the Exchange shall supervise all matters relating to the dissemination and use of quotations and of reports of prices on the Exchange and may approve or disapprove any application for wire connections between a member and non-member (R. 262). Rules 355 and 356 provide that no member shall maintain a wire connection with a non-member without prior consent of the Exchange and that the Exchange may require at any time the discontinuance of any means of communication which has a terminus in the office of a member firm (R. 262-63).

The private wire rules were adopted on May 9, 1900 and were continued substantially unchanged. The expressed objective was to prevent improper connections of every kind and description that might bring undesirable business onto the floor of the exchange to the detriment of investors. Congress was apprised of the rules and their objective in connection with one of the earlier bills introduced to regulate securities transactions. *Hearings before Senate Committee on Banking and Currency, 63d Cong., 2d Sess. 547-48*

(1914). The Commission was apprised of the rules when it registered the Exchange and found that the rules were just and adequate to insure fair dealing and protect investors.

D. The Obligation to Enforce Exchange Rules

The Exchange is required by Section 6(b) to have rules for the expulsion, suspension or disciplining of a member and is authorized by Section 6(c) to adopt other rules. It is required to enforce all of them. Its responsibilities under the Securities Exchange Act can be met in no other way. The Commission did not determine that the rules of the Exchange *might* be just and adequate to insure fair dealing and to protect investors but that they *would* be just and adequate when enforced. In *Baird v. Franklin*, 141 F. 2d 238, 244 (2d Cir. 1944), *cert. denied*, 323 U. S. 737 (1944), the Court stated:

"There can be no doubt that § 6(b) places a duty upon the Stock Exchange to enforce the rules and regulations prescribed by that section. Any other construction would render the provision meaningless. * * * If all that § 6(b) meant was that every exchange should pass token regulations, incapable of enforcement except at the wish of the exchange itself, there would have been no purpose for its inclusion in the Act. * * * [That section imposed] the twofold duty upon an exchange of enacting certain rules and regulations and of seeing that they are enforced."

And there can be no doubt that Congress, in incorporating Section 6(c), provided for the adoption of rules that the exchanges had the duty to enforce. Congress imposed upon the exchanges the "responsibility for promulgating regulations pertaining to the administration of their ordinary affairs" (S. Rep. No. 792, 73d Cong., 2d Sess. 13 (1934)), not as a pastime but to be enforced. In testifying before the House Committee considering proposed amendments to the Securities Exchange Act, Commissioner Purcell stated that "it does not seem reasonable to assume that the Congress intended merely to provide for the filing of

copies of exchange rules and to provide for their alteration by the Commission without any assurance that they would be enforced." *Hearings Before House Committee on Interstate and Foreign Commerce*, 77th Cong., 1st Sess. 1265 (1941). The same opinion was expressed by Commissioner Mathews before the Senate Committee considering the adoption of the Maloney Act when he stated:

"The exchanges may adopt rules subject to the jurisdiction of the Commission. They have certain obligations in seeing that their rules are enforced." *Hearings Before Senate Committee on Banking and Currency*, 75th Cong., 3d Sess. 7 (1938).

In view of the foregoing, the conclusion of the majority of the Court of Appeals that "the Exchange is required by virtue of the statute to enforce its rules" (R. 264) seems inescapable. The United States and the Commission agree "that an exchange must not only enact but also enforce rules for the discipline of its members. The Act contemplates an extensive and effective degree of self-regulation by an exchange, including *inter alia* enforcement, not just adoption, of rules."¹

E. The Enforcement of the Private Wire Rules in this Case

The Exchange's statutory responsibilities include the regulation of its members' business activities to promote high standards of conduct. Affirmative action is required not only for the protection of investors but to preserve the Exchange's reputation which, as the Court of Appeals stated, is "important to the national economy" (R. 265).

Implicit in the Exchange's rules governing its members' business activities is a standard designed to promote conduct consistent with just and equitable principles of trade. As the standard is based primarily on business

¹Brief for United States in support of petition for writ of certiorari, p. 9.

ethics, it cannot be set forth as part of a specific rule. This is apparent from *Avery v. Moffatt*, 187 Misc. 576, 592 (Sup. Ct. N. Y. Co. 1945), where the Court said:

“Moreover, securities trading is a highly complex field in which it is not always feasible to define by statute or by administrative rules having the effect of law every practice which is inconsistent with the public interest or with the protection of investors. As a result there is a large area for the operation of exchange rules on the level of business ethics rather than law, and in that sphere the statute leaves it to the exchanges to carry on the necessary work of prevention and discipline.”

The United States recognizes “that the Exchange in this instance was applying a standard of integrity and reliability. The termination of members’ wire connections with brokers and dealers who lack integrity and reliability is certainly conducive to the promotion of member conduct consistent with just and equitable principles of trade” (Br. 45). The Exchange concluded, after an extensive investigation, that the Silvers were sufficiently lacking in integrity and reliability that the temporary approval of the private wires should be withdrawn.

Plaintiffs’ principal contention is that the Exchange was powerless to act in this case because plaintiffs are non-members. It is apparent, however, that if the Exchange is to meet its statutory responsibilities in regulating the conduct of its members, it must consider all their activities in the securities field—with other members, the investing public, corporations issuing securities, and all others with whom they transact business, including non-members. The United States agrees that “the broad regulatory responsibilities of an exchange require it to police its members’ business dealings both on and off the exchange, in listed as well as in unlisted securities. * * * The statutory injunction that exchange rules must insure ‘fair dealing’ and ‘protect investors’ (Sec. 6(d)) reflects a congressional intention that the exchanges should regulate all conduct by

their members which may adversely affect the interests of investors, even though such members may not be directly or consciously responsible for any wrongdoing" (Br. 44).

Equally lacking in merit is plaintiffs' argument that Municipal, Inc. "utilized these private wire connections primarily to obtain quotations and transact business in over-the-counter securities" (Br. 5-6). Plaintiffs ignore the express representations made by Municipal, Inc. in its application for Exchange approval (R. 47-50) as well as the allegations of the complaint that Municipal, Inc. applied for and used the private wires to obtain quotations of, and effect transactions in, listed securities (R. 3).

In any event, the actual use made of private wires is irrelevant to the responsibilities of the Exchange in regulating its members. As the majority of the Court of Appeals stated:

"The Exchange must have sufficient power of discipline over its members to enable it to enforce the high standards of conduct which the Act contemplates. If it is to have the requisite power it cannot be hamstrung by an unjustifiable limitation based upon whether its members are at the moment dealing in listed or in unlisted securities" (R. 266).

With this ruling, the United States and the Commission are also in agreement. They recognize that "an exchange, in regulating the conduct of its members, must consider all of their securities transactions, not just their trading in listed securities on the exchange."²

Finally, the standing and reputation of the Exchange could not be preserved or enhanced by confining control over members in only one area of their business activities. Maintaining its reputation and the confidence of investors is one of the Exchange's most important objectives. The

² Brief for United States in support of petition for writ of certiorari, pp. 8-9.

Court of Appeals recognized the value of the Exchange's reputation in stating:

"It is highly important for the proper operation of the Exchange as a public institution that its membership and procedures continue to enjoy the confidence of investors. The reputation of the Exchange is a valuable asset from the public point of view" (R. 266).

Congress did not intend, and the Commission would not permit, the Exchange to relax its efforts to maintain its reputation at the highest level. Constant vigilance and prompt and decisive action are imperative. It cannot and should not be otherwise.

II

The Exchange should not be subject to the Sherman Act for actions taken pursuant to its responsibilities under the Securities Exchange Act.

The substance of the United States' argument is that although the Exchange exercises "regulatory functions which ordinarily are exercised only by the government itself" (Br. 34-35), it is a private association and therefore should not be granted an immunity similar to that of a government official (Br. 35, 49). Inherent in this argument is the failure to recognize that although the Exchange has attributes of both a government agency and a private association, it cannot act in both capacities at the same time. We submit that the only logical and consistent test in determining the issue of immunity is whether the Exchange is acting in its governmental capacity, in which its activities and responsibilities are comparable to those of the Commission, or in a private capacity unrelated to any regulatory obligations. When fulfilling its regulatory responsibilities under the Securities Exchange Act, the Exchange should no more be subject to the antitrust laws than is the Commission.

An additional and related error is the assumption that immunity can be granted only on the grounds of repugnancy between the Sherman and Securities Exchange Acts (Br. 23). Once it is recognized that immunity is required because of the governmental character of the Exchange's action, it becomes unnecessary to consider the issue of repugnancy. Immunity of a government official is predicated on the need to encourage effective administration of governmental policies and not because of a repugnancy between any laws. In any event, there is a clear repugnancy between the Sherman and Securities Exchange Acts which affords a second and separate ground for immunity.

Finally, the Commission has not only the authority to review the action of the Exchange but the responsibility of making a final decision on this matter subject to judicial review under Section 25(a) of the Securities Exchange Act. Court review of the enforcement of the Exchange's rules in an antitrust action would preclude Commission review of matters entrusted to it by Congress and on which it is eminently qualified to exercise its judgment.

A. The Exchange's Statutory Responsibilities

We have shown, and the United States agrees, that the Exchange's action in this case "was within the general area of its responsibilities under the Securities Exchange Act" (Br. 43). In meeting its responsibilities, the Exchange is performing functions comparable to those of the Commission. In fact, the Exchange's responsibilities are in some respects even greater. The Exchange has the primary obligation of regulating its members with the objective of protecting the investing public. Under the concept of self-regulation, the Commission's obligation is secondary; it is authorized to act in this area only if the Exchange fails to meet its obligations.

Neither the Exchange nor anyone else could be expected to discharge statutory obligations effectively under the constant threat of severe penalties. Absent any immunity,

the more effectively the Exchange regulates the conduct of its members, the greater the penalties that may be imposed under the antitrust laws. The United States was stating the obvious in acknowledging that "an exchange and its members may be reluctant to act vigorously in disciplining erring members if they are subject to possible antitrust liability should it ultimately turn out that they went beyond the bounds of permissible regulatory action in the particular case" (Br. 34).

It is for the same reason that government officials have long been held immune from civil liability for acts performed in the course of their official duties. *Spalding v. Vilas*, 161 U. S. 483 (1896). The privilege has been applied to commissioners of the Securities and Exchange Commission, *Jones v. Kennedy*, 121 F. 2d 40 (D. C. Cir. 1941), *cert. denied*, 314 U. S. 665 (1941), and is not even destroyed by allegations of malice. *Barr v. Matteo*, 360 U. S. 564 (1959). The basis of the rule is that governmental policies would be thwarted if a government official was deterred in the performance of his duties by threat of damage suits. It is not based on any other principle applicable only to government officials such as sovereign immunity. See 3 DAVIS, ADMINISTRATIVE LAW, pp. 506-44 (1958). The objective of the rule was stated in *Barr v. Matteo, supra*, as follows:

"The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." (360 U. S. at 571.)

There has been no occasion to apply this rule to a private organization because, with the exception of the Securities Exchange Act, Congress has rarely delegated governmental powers to a private group. But the reasons for applying the rule to the Exchange are even more com-

elling than in the case of a government official. If subject to the antitrust laws, the Exchange must face the spectre of treble damages (in this case allegedly \$3,000,000), costs, attorney's fees, fines and imprisonment—hardly an appropriate reward for "performing a vital public function" (R. 265).

When confronted with a situation which may call for the exercise of disciplinary or other regulatory powers, how could the Exchange be expected to make an objective appraisal if required to act at its peril and face the threat of such penalties? A detached evaluation with the protection of investors as the paramount objective would be replaced by a consideration of the antitrust consequences. And since almost all Exchange activities require concerted action on the part of its members, they might be considered to be within the purview of Section 1 of the Sherman Act. The Exchange would be confronted with an almost insurmountable obstacle in meeting its responsibilities. A serious threat to the continued effectiveness of the self-regulatory scheme envisioned by Congress and acknowledged to have been outstandingly successful would be presented. When viewed in this light, it is clear that Congress could not conceivably have intended the antitrust laws would apply to the Exchange when meeting its statutory responsibilities. To hold that they do would, in our view, be tantamount to destruction of a carefully thought-out and implemented regulatory pattern.

B. The Repugnancy Between the Sherman and Securities Exchange Acts

The Sherman Act requires each business entity to exercise its own independent judgment in deciding whether to deal with others. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959). The Securities Exchange Act, however, requires that the decision be made not by each member firm but by the Exchange whenever necessary to maintain high ethical standards and promote conduct consistent with just and equitable principles of trade.

Furthermore, the Exchange, as an unincorporated association, can function only through its members. Not a single regulatory rule of the Exchange can be implemented without joint action, or inaction, on the part of its members. Any action required by its rules, having an adverse effect upon a non-member, might technically be considered to be the product of a combination or agreement. The Commission's views on this unique situation were expressed in its brief *amicus curiae* in the Court of Appeals as follows:

"But inherent in the concept of an organization consisting of members whom it is required to discipline—which is precisely what an exchange registered under the Securities Exchange Act is—there is the possibility that otherwise appropriate and necessary disciplinary action may unavoidably have an inherent adverse effect on a non-member. To say that such an effect may violate the anti-trust laws would seriously impair and *pro tanto* negate the basic concept established by the Securities Exchange Act, namely, self-disciplining exchanges organized on a membership basis." (pp. 11-12.)

It is impossible to believe that Congress intended enforcement by the Exchange of one of its rules—whether adopted by the Exchange and approved by the Commission or written by the Commission itself under Section 19(b)—could result in a violation of the antitrust laws. Stated differently, "it would be absurd to punish under one federal law action taken pursuant to another." 111 U. OF PA. L. REV. 236, 238 (1962).

C. Review of Exchange Decisions by the Commission

The United States' principal concern with the Court of Appeals' decision is that the Securities Exchange Act does not provide a "method for correcting arbitrary disciplinary action by an exchange" (Br. 41). The Commission has ample authority to correct such action under Section 19(b) or Section 23(a) and its determination would be subject to judicial review under Section 25(a).

Section 19(b) of the Securities Exchange Act authorizes the Commission to require that an exchange make "speci-

fied changes in its rules and practices" which are "necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange." Unless such changes are made, the Commission is empowered to "alter or supplement the rules of such exchange" relating to such matters as "the manner, method, and place of soliciting business; * * * the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange * * * [and] similar matters." In discussing this section, plaintiffs significantly avoid any reference to the terms "soliciting business" and "similar matters" (Br. 12, 28-29). We submit that in the context of Section 19(b), the private wire rules are included in the phrase "similar matters," since they were used by members for "soliciting business" and were obtained by Municipal, Inc. for the express purpose of, and in fact used for, obtaining quotations of "transactions on the Exchange." As the Commission pointed out in *Matter of the Rules of the New York Stock Exchange*, 10 S.E.C. 270, 293 (1941), "under the rules of law governing construction of statutes Section 19(b) should be construed broadly to accomplish its purposes."

The effect of the District Court's order is to amend the private wire rules. To enjoin the Exchange from enforcing a rule except under limited conditions is, as a practical matter, the same as amending that rule. The proposed conditions which the United States seeks to impose in the enforcement of the private wire rules are, in effect, the same as supplementing those rules. Whether viewed as an amendment of, or a supplement to, the rules, Congress delegated to the Commission and not to the courts the authority to make such changes.

In addition to its authority to make changes in the "rules and practices" of the Exchange under Section 19(b), the Commission is authorized by Section 23(a) "to make such rules and regulations as may be necessary for the execution of the functions vested" in it by the Act. The effect of

Section 23(a) is discussed in Comment, *Stock Exchange Regulation of Nonmember Brokers*, 71 YALE L. J. 748, 758 (1962), as follows:

"Since one of the SEC's functions is to insure the fair administration of an exchange's activities, promulgation of a hearings rule to be complied with by the exchanges would be proper. And, if an exchange failed to adhere to the SEC rule by denying a hearing to over-the-counter dealers in disciplinary proceedings, the SEC is authorized by statute to suspend or revoke the exchange's registration. Moreover, if a provision is included in the SEC rule allowing for an appeal to the SEC by nonmember dealers who have been denied a hearing, still another objective of the 1938 amendment can be incorporated into the field of exchange regulation."

The only remaining question is whether, because of the antitrust issues, the Commission is to be denied the right to exercise the duties entrusted to it by Congress despite its "intimate familiarity with the characteristic features of the [securities] industry." *United States v. Morgan*, 118 F. Supp. 621, 699 (S. D. N. Y. 1953). The broad and pervasive scope of the Securities Exchange Act is apparent from the Commission's decision in *Matter of the Rules of the New York Stock Exchange*, 10 S. E. C. 270, 293 (1941), where it said:

"Section 2 recites that transactions in securities as conducted upon national securities exchanges are affected with a national public interest, which makes it necessary to provide for regulation and control of such transactions and 'of practices and matters related thereto,' and 'to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce . . . and to insure the maintenance of fair and honest markets in such transactions.' It should be noted that the regulation contemplated by the Act was to be 'reasonably complete and effective'; that it was to cover not only national securities exchanges but also 'the practices and matters related thereto'; that interstate

commerce was to be protected, and that fair markets in securities transactions were to be maintained."

Control by the Commission "of practices and matters related" to "transactions in securities" could not be "reasonably complete and effective" if the presence of antitrust issues required that control be transferred to the courts. Moreover, Commissioner Mathews' testimony at the Maloney Act hearings indicates that Congress intended the Commission would resolve all issues relating to practices of exchanges, including antitrust issues. He stated:

"The Securities Exchange Act, to my mind, represents an attempt to bring those monopolistic practices [of exchanges] under Government control, to see that the acts and practices of the exchanges are carried out in the public interest. Some people have likened the proper sphere of the exchanges to that of a public-service corporation, in which the monopolistic element may properly be recognized but in which the need of regulation goes hand in hand with the grant of monopolistic privileges." *Hearings before Senate Committee on Banking and Currency, 75th Cong., 3d Sess. 7 (1938).*

Pursuant to its Congressional mandate, the Commission has, on prior occasions, resolved the conflicting objectives of the securities laws and antitrust laws. In *Matter of the Rules of the New York Stock Exchange*, 10 S. E. C. 270, 287 (1941), the Commission pointed out that one of the basic purposes of regulation under the Securities Exchange Act "is closely related to the public policy regarding unreasonable restraints and the maintenance of fair competition as declared by Congress in the Sherman Act, the Clayton Act and the Federal Trade Commission Act." Similarly, in *Matter of National Ass'n of Securities Dealers, Inc.*, 19 S. E. C. 424, 436 (1945), the Commission said:

"Thus the application of the Sherman Act has been properly raised as a problem to be considered in the course of our special administrative functions under the Securities Exchange Act."

Where, as here, the matter relates solely to practices of a registered exchange, it lies within the purview of the Commission and "Congress must have intended to give it authority that was ample to deal with the evil at hand." *Pan American World Airways v. United States*, 31 U. S. L. Week 4124 (Jan. 14, 1963).

Also relevant to this issue are the Commission's views as to the appropriate tribunal to decide this case. The United States acknowledges that the Commission would ordinarily entertain a complaint filed "by a person adversely affected by a rule of an exchange" (Br. 17, fn. 11). If plaintiffs were adversely affected by the private wire rule as enforced, their remedy was to obtain review by the Commission. The United States' brief also states (46-47):

"The Commission is aware of its responsibility in the administration of the securities laws to achieve a reasonable accommodation or balance between the salutary purposes of those laws and the antitrust laws, and it points out that the supervision of self-regulatory activities does involve weighing of alternatives and of perhaps conflicting objectives in the context of particular practices and problems. The Commission believes that as a matter of governmental policy the Commission, the agency designated by Congress to supervise the securities industry, including the exchanges, in the public interest, is the logical agency to make determinations in this area—especially because the interjection of antitrust procedures and doctrines at the behest of private litigants or indeed of other agencies of government could seriously impair the ability of the Commission, as an independent agency, to exercise its supervisory functions under the Act."

If an administrative agency's "disinclination to assume jurisdiction * * * is entitled to some weight," (*Pan American World Airways v. United States*, *supra*, dissenting opinion), conversely, the Commission's position on accepting jurisdiction in this case to avoid impairing its

ability to exercise its supervisory functions is entitled to at least equal weight.

III

The immunity of the Exchange from the Sherman Act should be determined on the basis of its statutory responsibilities and not be made dependent upon the reasonableness of its action.

The United States' commendable effort to reconcile the conflicting policies of the Sherman and Securities Exchange Acts raises, in our view, more problems than it would resolve. In acknowledging that an immunity from the anti-trust laws is required if the Exchange is to continue to meet its statutory obligations, the United States proposes that such immunity be conditioned upon the reasonableness of the Exchange's action, i.e., that it follow a reasonable procedure and arrive at a reasonable decision (Br. 50-52).

We have shown, and the United States agrees, that the Exchange could not be expected to discharge its statutory obligations with the prospect of treble damages, costs, fines and imprisonment as its only reward. Obviously, it would be no less reluctant to meet those obligations if exoneration were dependent upon convincing a court that it did not exceed the bounds of what is considered, with the benefit of hindsight, to be reasonable action. There are many situations in which one person would believe there is a need for affirmative action, another person would be somewhat doubtful and a third would believe that no action was warranted. Moreover, what appears to the Exchange as reasonable may seem unreasonable to someone unfamiliar with the daily problems confronting the Exchange in the specialized field of securities trading, the methods available for meeting those problems, and the effectiveness of those methods.

Related to the issue of the extent of any immunity is the United States' contention that the conflicting statutory policies should be reconciled on a case-by-case basis (Br.

16-17). We submit, however, that the Exchange would be severely handicapped in meeting its statutory obligations if required to assume the burden of predicting—with sufficient certainty to justify the risk of the civil and criminal sanctions of the antitrust laws—that a court would agree it had acted reasonably in every one of the countless situations that arise almost daily throughout the year. To apply such a test would, as the Court of Appeals stated, “go far toward defeating the statutory policy of self-regulation” (R. 266).

The inability of courts to agree on whether conduct is reasonable or arbitrary is apparent from numerous decisions. For example, in *Matter of Marburg v. Cole*, 175 Misc. 308, 314 (Sup. Ct. Albany Co. 1940), the Court held that the refusal of the New York Commissioner of Education and Board of Regents to approve an application for a medical license was “arbitrary and unreasonable.” The Appellate Division affirmed, but a dissenting judge stated that “we may not say that the educational authorities of the State have acted unfairly, arbitrarily or capriciously in passing on respondent’s application.” 261 App. Div. 324, 338 (3d Dep’t 1941). The Court of Appeals reversed in a five-to-two decision, the majority holding that the refusal was not “arbitrary, unfair or capricious” (286 N. Y. 202, 211), the dissent stating that the “defendants went far outside the bounds of their broad discretion in denying his application” (p. 215). See also, e.g., *O’Beirne v. Overholser*, 193 F. Supp. 652 (D. D. C. 1961), *rev’d*, 302 F.2d 852 (D. C. Cir. 1961); *Matter of Gambino v. State Liquor Authority*, 7 Misc. 2d 983 (Sup. Ct. N. Y. Co. 1956), *rev’d*, 4 App. Div. 2d 37 (1st Dep’t 1957), *aff’d*, 4 N. Y. 2d 997 (1958); *Matter of Marks v. Regents of University of N. Y.*, 203 Misc. 837 (Sup. Ct. Albany Co. 1951), *rev’d*, 279 App. Div. 476 (3d Dep’t 1952), *aff’d*, 306 N. Y. 591 (1953); *Matter of Rochester Gas & Electric Corp. v. Maltbie*, 172 Misc. 359 (Sup. Ct. Albany Co. 1939), *rev’d*, 258 App. Div. 682 (3d Dep’t 1940), *aff’d*, 284 N. Y. 626 (1940).

The test which should be applied is whether the Exchange acted in good faith and within the scope of its statutory authority. Unlike a standard of reasonableness, a test

of good faith would not deter the Exchange in the diligent performance of its statutory obligations and, at the same time, would be sufficient to deter the Exchange from misuse of its regulatory powers, which appears to be the primary concern of the United States (Br. 32).³ The record will be searched in vain for any indication that the Exchange did not act in good faith.

The difficulty in predicating immunity upon "reasonableness" becomes even more evident after analysis of the United States' proposal. The procedural prerequisites are acknowledged to "depend upon the circumstances" (Br. 50). But "if a standard can be no more specific than 'all the circumstances,' there is no way of anticipating what the standard may be."⁴

The requirement that "a thorough inquiry" be conducted is, on its face, eminently reasonable but may be as deceptive as the other proposed criteria. For example, in this case the Exchange had an investigation made by several independent investigating agencies which it had used for many years and had found to be reliable and well qualified (R. 97). That more than seven months were required to complete the investigation (R. 47, 63) indicates its thoroughness. Even after Silver submitted letters of recommendation to the Exchange, three additional reports were obtained which confirmed the prior reports (R. 194). In spite of this, the United States arrives at the incredible conclusion that "the thoroughness of such investigation seems open to question" (Br. 53-54). This conclusion is based upon an equally incredible ground, i.e., that "with

³ This is not a case where a non-member "of the highest qualifications is denied access to * * * facilities as a result of a conspiracy designed to restrain competition and deprive him of his [business] in order to benefit competing members of the conspiracy." *Willis v. Santa Ana Community Hospital Ass'n*, 26 Cal. Rptr. 640, 642 (Cal. 1962). Nor is it a case where the private wires were discontinued for reasons "patently arbitrary or discriminatory" e.g., that the applicant "was a Democrat or a Methodist." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U. S. 886, 898 (1961).

⁴ Westwood & Howard, *Self-Government in the Securities Business*, 17 LAW & CONTEMP. PROB. 518, 542 (1942).

respect to one of the four grounds upon which the Exchange based its action—the charge that Silver had made a misstatement in connection with the acquisition of certain stock * * * the district court found (R. 230) that had the Exchange first checked with the Securities and Exchange Commission, it would have discovered that Silver had submitted a statement to the Commission which exculpated him” (Br. 54). Not only is this an excellent example of hindsight, but the Exchange had no reason to suspect that the matter had even been considered by the Commission. If the failure to pursue one remote possibility renders the thoroughness of the entire investigation “open to question,” only “the most resolute, or the most irresponsible”⁵ would take affirmative action.

Furthermore, the Commission did not “exculpate” the Silvers. On the contrary, in the Commission’s letter to the Silvers it noted that they had discontinued the sales of such stock “as a result of the inquiry into this matter by [the Commission]” (Pltfs’ Ex. 64, Certified Record 585). The Commission also stated that its letter “does not constitute a ruling by the Commission and will not serve to relieve you of possible civil liability under applicable legislation” (*id.* at 587). The discontinuance of sales of securities as a result of a Commission investigation warrants at least a permissible inference that such sales were improper. An inquiry by the Exchange, would have served no purpose other than to confirm the Exchange’s decision.

The proposal that the Exchange disclose the reasons for its decision and afford the non-member an opportunity to answer, although not objectionable, is inapplicable to this case. Municipal, Inc. expressly agreed that “the said wire or other connections and the furnishing of said quotations to us shall be discontinued whenever [the Exchange] shall withdraw approval thereof” (R. 49) and not only after a hearing and disclosure of the Exchange’s reasons. In ac-

⁵ *Gregoire v. Biddle*, 177 F. 2d 579, 581 (2d Cir. 1949), cert. denied, 339 U. S. 949 (1950).

cepting this condition, Silver waived any rights he may have had to a hearing or a disclosure of the reasons. In any event, the issue of the Exchange's liability under the Sherman Act should not turn on whatever procedural rights plaintiffs may have had.

The remaining proposed condition which the United States contends the Exchange should meet, but did not in this case, is that it have reasonable grounds for concluding that the non-member lacked integrity and reliability (Br. 51, 54). First, the ground that Silver had breached an agreement relating to the acquisition of certain shares of stock certainly bears on his integrity and reliability as a securities dealer. As previously stated, Silver had made substantial sales of such securities within two months after he agreed he had no present intention of selling them and discontinued doing so only after an investigation had been made by the Commission.

Second, but no less important, is the suspension of the security clearance of the Silvers and a corporation of which they were officers, directors and substantial stockholders, and their repeated, but unsuccessful, efforts to have the suspension vacated (R. 97). The District Court's conclusion that "the Exchange chose to rely upon the naked fact that the security clearances had been suspended without any information as to the nature of the charges which had been made against the Silvers" (R. 231) has no record support. The District Court's conclusion apparently resulted from the Exchange's statement in its affidavit on the motion for summary judgment of the reasons for the security clearance suspension which had been admitted by Silver on his deposition (R. 97-98) and as to which there could be no question. The documents produced by Silver (R. 107-10) were submitted by the Exchange to the District Court for the additional purpose of refuting Silver's contention that he did not know why his security clearance had been suspended (R. 97). But this cannot justify as an "inescapable conclusion"

(R. 233) that the Exchange did not know at least some of those reasons at the time the private wires were discontinued.

Moreover, implicit in the suspension of security clearance is that it had once been granted, that all formal requisites had been met, and that it was revoked for a sound reason. Even assuming, contrary to the fact, that the Exchange did not know any of the reasons for the suspension, there is no warrant for branding as arbitrary the inference that the suspension was for reasons impugning the person's integrity and reliability. The error in so doing is apparent from the admitted grounds on which the suspension was based, i.e., that the Silvers "intentionally and without authorization disclosed classified security information," that they had "willfully disregarded security regulations," that their "behavior, activities and associations tend to show that [they] are not reliable and trustworthy," and that they had "deliberately falsified facts and omitted to reveal certain material facts . . . to official representatives of the U. S. Navy and U. S. Air Force" (R. 97-98).

If reasonableness is the standard to be applied, the question is not whether any member of this Court agrees with the Exchange's conclusion but whether the Court recognizes that a reasonable man might reach the same conclusion. Furthermore, the reasonable man in question is an organization charged by statute with the primary obligation of regulating the conduct of its members for the protection of the investing public. A second consideration is that the Exchange knows it may be liable for any damages which could have been avoided had affirmative action been taken. A further consideration is the Exchange's realization that if it does not act promptly and effectively, the Commission stands ready to act in its place and, in doing so, would weaken a concept which Congress believes to be the most effective and desirable for investors—the concept of self-regulation. When viewed in this context, the decision of the Exchange should not be considered to be "without adequate determining principle or . . . unreasoned."

as this Court defined "arbitrary" in *United States v. Carmack*, 329 U. S. 230, 243 (1946).

As a final argument that the Exchange did not have sufficient grounds for its decision, the United States argues that the Exchange merely discontinued the private wires but "did not forbid its members from all dealings with petitioners" and therefore "cannot claim that its action against petitioners was designed to protect its members from *dealing* with people who were themselves likely to engage in improper securities transactions" (Br. 57). The simple and obvious answer to this contention is that the Exchange can function, as Congress contemplated and the Commission requires, only in accordance with its rules. It took the most effective action contemplated by its rules under the circumstances presented in this case.

IV

The action of the Exchange, if not immune from the Sherman Act, should be judged only after a full inquiry afforded by a trial.

We have established that the Exchange is immune from the antitrust laws when acting pursuant to its responsibilities under the Securities Exchange Act. Even assuming that it is not, the facts in this case do not warrant the application of the *per se* rule without a full inquiry into the necessity for the Exchange's decision in carrying out its responsibilities. The extensive regulation of the Exchange and its statutory obligations to enforce its rules require that its action be judged only at a trial.

We are not here dealing with independent business entities that embark on programs of concerted action for the purpose of restraining trade or gaining competitive advantages as in *Radiant Burners v. Peoples Gas Light & Coke Co.*, 364 U. S. 656 (1961); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959); and *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U. S. 457 (1941). The Exchange's sole objective was to perform conscientiously the important duties imposed upon it by the Securi-

ties Exchange Act. Furthermore, the private wire arrangement was for the mutual benefit of plaintiffs and the member firms. After the discontinuance of the private wires, the member firms shared the loss of whatever benefits may have resulted from such arrangement.

The United States acknowledges that "to some degree self-regulation may be weakened by the application of concepts of *per se* liability under the antitrust laws which were evolved for the purpose of suppressing anti-competitive combinations without inquiry into alleged justifications therefor in particular cases" (Br. 33). That the principle of self-regulation may be weakened to any degree is alone sufficient reason for rejecting the *per se* rule in this case. The conflicting policies of the Sherman and Securities Exchange Acts cannot be effectively resolved by automatic condemnation of any restraint resulting from action taken under the latter. The policies of the Securities Exchange Act are entitled to at least equal consideration. To hold otherwise would mean that any restraint of trade must be condemned even if the ultimate loss falls on the investing public.

Whether the *per se* rule should be applied cannot be determined on the record here made. There has been no "inquiry . . . into the character and background of the industry involved." *United States v. Morgan*, 118 F. Supp. 621, 635 (S. D. N. Y. 1953). The solution of antitrust problems "depends in the last analysis upon an intimate familiarity with the characteristic features of the particular industry in which these problems arise" (*id.* at 699).

The extent of the inquiry required—and which was not permitted here—was stated by Mr. Justice Brandeis in *Chicago Board of Trade v. United States*, 246 U. S. 231, 238 (1918), as follows:

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such

as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

The mere statement of the nature of the inquiry is sufficient to show that it can be made only at a trial.

Conclusion

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

A. DONALD MACKINNON
1 Chase Manhattan Plaza
New York 5, New York
Attorney for Respondent

SAMUEL L. ROSENBERY
EDWARD J. REILLY, JR.
SQUIRE N. BOZORTH

Of Counsel

January 28, 1963

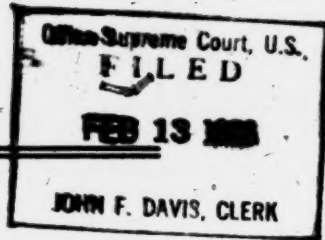
APPENDIX**Section 23(a) of the Securities Exchange Act of 1934:**

The Commission and the Board of Governors of the Federal Reserve System shall each have power to make such rules and regulations as may be necessary for the execution of the functions vested in them by this title, and may for such purpose classify issuers, securities, exchanges, and other persons or matters within their respective jurisdictions. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission or the Board of Governors of the Federal Reserve System, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

Section 25(a) of the Securities Exchange Act of 1934:

Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, and enforce or set aside such order, in whole

or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).



IN THE
Supreme Court of the United States
October Term, 1962

No. 150

**HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES
COMPANY and MUNICIPAL SECURITIES COM-
PANY, INC.,**

Petitioners,

v.

NEW YORK STOCK EXCHANGE,

Respondent.

REPLY BRIEF FOR PETITIONERS

DAVID I. SHAPIRO,
1411 K Street, N. W.,
Washington 5, D. C.,
Attorney for Petitioners.

DICKSTEIN, SHAPIRO & GALLIGAN,
20 East 46th Street,
New York 17, N. Y.,

GOLDBERG, FONVILLE, GUMP & STRAUSS,
2232 Republic National Bank Building,
Dallas 1, Texas,
of Counsel.

IN THE
Supreme Court of the United States

October Term, 1962

No. 150

**HAROLD J. SILVER, d/b/a MUNICIPAL SECURITIES COMPANY
AND MUNICIPAL SECURITIES COMPANY, INC.,**
Petitioners,

v.

NEW YORK STOCK EXCHANGE,
Respondent.

REPLY BRIEF FOR PETITIONERS

Statement

The United States argues that the NYSE is authorized to require its members, who are engaged in legal and ethical dealings with nonmembers, to cease doing business with such nonmembers, provided that the Exchange makes a reasonable determination, after notice and hearing, that these nonmembers are untrustworthy or unreliable (Gov't Br., 43-52). The NYSE agrees, except it urges that the test should not be "reasonableness", but whether "the Exchange acted in good faith and within the scope of its statutory authority" (Res. Br., 28). Since a nonmember aggrieved by Exchange action purportedly taken under its filed rules has no administrative remedy before the SEC (R. 222; Gov't Br., 41), adopting these arguments would vest in the New York Stock Exchange power to determine the life or death of nonmember over-the-counter securities dealers, to the exclusion of the only agencies charged with

responsibility in such matters—the SEC and NASD (See Pet. Br., 22-27).

In our view, these attempts to “accommodate” the anti-trust laws out of existence insofar as they apply to registered securities exchanges must fail. *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195, 204-205, 209-210 (1962). When Congress intended to permit private associations, sharing responsibility with the SEC for policing a particular securities market, to promulgate rules in effect prohibiting members from dealing with, or providing services to, nonmembers, it did not hesitate to say so and, in fact, specifically granted such associations antitrust immunity. See sections 15-A(b) (9) and 15-A(n) of the Act, 15 U. S. C. §§ 78o-3(b) (9), 78o-3(n) and discussion of cooperative over-the-counter securities regulation by the NASD and SEC (Pet. Br., 25-27). The foregoing makes clear “how far Congress intended that the [Securities Exchange Act] should operate to render the Sherman Act inapplicable. If Congress had desired to grant any further immunity, Congress doubtless would have said so”. *United States v. Borden Co.*, 308 U. S. 188, 201-202 (1939).

I.

The NYSE's Action Was Not Immunized From the Antitrust Laws.

A. The Government's Brief.

The Government's basic error (Gov't Br. 43-52) is its failure to recognize that cooperative policing activities by the SEC and the Exchange under the 1934 Act are limited to Exchange *members* or *member firms*. Section 6(b) of the Securities Exchange Act, 15 U. S. C. § 78f(b), which requires the NYSE's rules to “include provision for the expulsion, suspension, or disciplining of a *member* for conduct or proceeding inconsistent with just and equitable

principles of trade * * * ", says nothing about the conduct of nonmembers. And, according to SEC Commissioner Healy, the "phrase 'just and equitable principles of trade' * * * was well and probably universally understood to govern the dealings of [stock exchange] members with each other." *National Association of Securities Dealers, Inc.*, 19 SEC 424, 484 (1945). Congress was well aware that "control exercised by stock exchange authorities is admittedly limited to their own members, and they are unable to cope with those practices of nonmembers which they deplore but cannot prevent." *S. Rep. No. 792 on S. 3420* 73d Cong. 2d Sess., 4 (1934).

The power to terminate a member's wire connection with unethical or unreliable broker-dealers, while "certainly conducive to the promotion of [nonmember] conduct consistent with just and equitable principles of trade", is unlikely to promote such conduct on the part of members. The Government's contrary assertion (Gov't Br. 45) is specious.¹ Therefore, since exchange officials disclaimed any "power to prevent abuses" by nonmembers (*S. Rep. No. 1455, pursuant to S. Res. No. 84*, 73d Cong. 2d Sess., 81 [1934]), and since that disclaimer was one of the reasons why Congress rejected the exchanges' view "that internal regulation obviated the need for governmental control * * * " (*S. Rep. No. 792 on S. 3420*, 73d Cong. 2d Sess., 4 [1934]), power to prevent nonmember abuses was vested not in the exchanges, but in the SEC under Sections 19(a)(3) and 21(e) of the Act. 15 U. S. C. §§ 78s(a)(3), 78u(e) (See

¹ While exchange members "have a perfect right as between themselves to ordain what should constitute the ethics of the trade or profession * * * , [the Exchange cannot] prevent the continuance of a proper and lawful business so long as the plaintiff conducts its business in a legal manner and without complaint from the buying and selling public, or from those officials elected to enforce either civil or criminal law who have power to stop any abuses or fraud." *Pirnie Simons & Co. v. Whitney*, 144 Misc. 812, 259 N. Y. S. 193, 211-212 (1932).

Pet. Br. 23). That Congress in the 1934 Act gave power to prevent nonmember abuses to the SEC *exclusively* is manifest not only from Sections 19(a)(3) and 21(e) of the Act, but from Section 15 of the Act (the broker-dealer registration provision) as well. Under this latter provision it is the SEC which is authorized to investigate the character, reputation and business ethics of nonmembers and to take action, after notice and hearing, in accordance with specific statutory criteria.²

The Government is therefore in error when it asserts that respondent's antitrust liability turns on the "reasonableness" of the Exchange's determination after notice and hearing (Gov't Br. 50-52). Immunity from the antitrust laws cannot be predicated upon the establishment of "an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of [nonmember] violations * * *." *Fashion Originator's Guild v. FTC*, 312 U. S. 457, 465 (1941). *A fortiori*, where Congress provides an administrative agency with the power to prevent nonmember abuses, the authority to investigate, and the authority to take action under specific statutory criteria in accordance with "due process", counterpart regulation by the Exchange is foreclosed, unless Congress specifically states otherwise. Cf. *Garner v. Teamsters, Chauffeurs and Helpers etc.*, 346 U. S. 485, 490-491 (1953).

² These criteria are (1) willful material false statements in registration applications; (2) conviction of a felony or misdemeanor arising out of the conduct of the business of a broker or dealer within the ten years preceding registration; (3) injunction by court order restraining any practice connected with sale or purchase of any security; and (4) a willful violation of any provision of the Act or any SEC rule or regulation thereunder. 15 U. S. C. § 78o(b).

B. Respondent's Brief.

The order of the district court in no way affected the Exchange's right to regulate its members with respect to their manner of "soliciting business" or their "reporting of transactions on the exchange" and was restricted to private wire connections used for trading or otherwise dealing "in over-the-counter securities, municipal bonds or securities not listed for trading on the New York Stock Exchange" (R. 240). Respondent ignores that order and argues that since the private wires "were used by members for 'soliciting business' and were obtained by Municipal Inc. for the express purpose of, and in fact used for, obtaining quotations of 'transactions on the Exchange'" (Res. Br. 23), its wire connection rule³ was subject to alteration or amendment by the SEC under sections 19(b) and 23(a) of the Securities Exchange Act, 15 U. S. C. §§ 78s(b), 78w(a) (Res. Br. 22-26).

Respondent's argument might have had more merit if the Exchange had directed its various member firms not to solicit "listed" business or report "transactions of listed securities" over their respective private wires with petitioners. The Exchange did not do this. Instead, on February 12, 1959, the NYSE informed those of its member firms listed on its records as having private wires with petitioners that:

"Effective immediately, the Exchange has withdrawn the temporary approval granted your firm * * *. We would appreciate your advising us as soon as this wire has been discontinued." (R. 63)

Since MSC used its private wires with member firms solely to obtain quotations and transact business "in municipal securities, municipal bonds, and unlisted securities" (R. 155) and since MSC, INC. did no "listed" business over

³ See Pet. Br. 17-18.

its private wires with some member firms (R. 80),⁴ it is plain that the wire connection rule, as applied, was nothing more than a device through which respondent excluded petitioners from a substantial part of the over-the-counter securities market (Pet. Br. 17-20). The order of the district court (R. 240) was directed to that evil.

Accordingly, there is no "supersession to an extent" problem whatsoever. Section 19(b) of the Act, which gives the SEC power to "insure fair administration of [the] Exchange" with respect to exchange rules concerning "(8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange * * *; and (13) similar matters," 15 U. S. C. § 78s(b), does not include private wires between members and nonmembers used to communicate with respect to over-the-counter securities (Pet. Br. 28-29).⁵ Assuming, *arguendo*, that it does,

⁴ The widespread use of private wires to trade in over-the-counter securities is well known (see Pet. Br. 15-17) and this knowledge is shared by the NYSE and its member firms (R. 84). Furthermore, the NYSE asserted that it "undertook an investigation of [MSC, INC.] and its officers through independent agencies which defendant believed to be reliable and well-qualified" (R. 97) and that it took the action it did "only after careful consideration" of the "results of [that] investigation * * *" (R. 125). If, "after careful consideration" of the results of that investigation, the NYSE was unaware that MSC and MSC, INC. were using their private wires to trade and communicate with respect to transactions in over-the-counter securities and municipal bonds, it could have obtained that information simply by asking its member firms. In any event, since the necessary effect of the NYSE's action was to prohibit MSC and MSC, INC. from using its private wires with member firms to effect transactions in over-the-counter securities and municipal bonds, respondent "must be held to have intended the necessary and direct consequences of [its] acts, and cannot be heard to say the contrary." *United States v. Patten*, 226 U. S. 525, 543 (1913).

⁵ As the district court pointed out, "the definition of an Exchange 'facility' in subsection 3a(2) of the 1934 Act * * * does not include private wire connections between members and nonmembers. A 'facility' is defined as including an exchange's * * * premises, tangible or intangible property whether on the premises or not, any right to

nothing in either the 1934 Act or its legislative history reveals that SEC was given power to decide antitrust issues as such (*United States v. RCA*, 358 U. S. 334, 346 [1959]), or that SEC inaction was intended to prevent enforcement of the antitrust laws in the courts. *United States v. Borden Co.*, 308 U. S. 188, 197-198 (1939). For, while antitrust considerations are indeed relevant to the performance of the SEC's functions under sections 19(b) and 23(a) of the Act (Res. Br. 26), "there is no 'pervasive regulatory scheme' including the antitrust laws that has been entrusted to the Commission." *California v. FPC*, 369 U. S. 482, 485 (1962). Moreover, whatever the scope of sections 19(b) and 23(a) of the Act with respect to the wire connection rule itself, "the Commission cannot review the application of the rules of an exchange in a particular case * * * " (Gov't Br. 41). "[T]he Commission lacks power to grant relief * * * " against the wire connection rule, as applied, and, hence, there is in this case no repugnancy between the Sherman and Securities Exchange Acts. *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 461 (1945); *Pan American World Airways, Inc. v. United States*, 31 L. W. 4124, 4126 (1963).

The foregoing disposes of, not only the Exchange's arguments concerning "implied immunity" (Res. Br. 21-27), but

the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange by ticker or otherwise maintained by or with the consent of the exchange) * * * " (R. 222-223). The district court's conclusion is fortified by the meaning of the term "by or with the consent of the exchange" used in sections 3a(2) and 19(b)(8) of the Act. It refers to continuous stock (ticker service) quotations furnished by telegraph companies under contractual arrangements with exchanges. *Hunt v. New York Cotton Exchange*, 205 U. S. 322, 336 (1907); *Matter of Renville* (1st Dept.), 46 App. Div. 37, 38-43 (1899); *Tucker v. Western Union Telegraph Co.* (Sup. Ct., Erie Co.), 95 Misc. 287, 289-292 (1915). Such arrangements were a matter of congressional knowledge as early as 1913. *H. R. Rep. No. 1593*, 62d Cong., 3d Sess., 34 (1913).

also the Exchange's arguments concerning the *per se* rule (Res. Br. 33-35). Since petitioners were competing in the over-the-counter market with each of the Dallas member firms with whom they had private wire connections (R. 43-44, 128), it is irrelevant that the statute gives the Exchange disciplinary powers over exchange members "with respect to their transactions in over-the-counter securities and that the policy of the statute requires that the Exchange exercise these powers fully" (R. 266). It is as much a violation of the Sherman Act *per se* for competitors to foreclose another competitor from any substantial market, as it is for competitors to restrain independent action among themselves. *E.g.*, *International Salt Co. v. United States*, 332 U. S. 392, 396 (1947); *Associated Press v. United States*, 326 U. S. 1, 13-14 (1945).

The fact that the Exchange is extensively regulated under the Securities Exchange Act and is obligated to enforce its rules, while relevant to the question of immunity, is therefore irrelevant to the question whether its conduct should be measured under a "rule of reason". Either the Exchange is exempted from the antitrust laws by statute or under the rule of "supersession to an extent"—or it is not exempted at all. Extensive regulation by administrative agencies does not diminish the vitality of the *per se* rule. *United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, 225-228 (1940); *Pennsylvania Water Power Co. v. Consolidated G. E. L. & P. Co.*, 184 F. 2d 552, 557-560 (C. A. 4, 1950), certiorari denied, 340 U. S. 906 (1950); *Atchison, Topeka & Santa Fe Ry. Co. v. Aircoach Transport Association*, 253 F. 2d 877, 886-887 (C. A. D. C., 1958).

II.

Congress Provided No Immunity for Arbitrary Exchange Action.

The Exchange argues that it is acting in a governmental capacity comparable to that of the SEC (Res. Br. 18) and is immune from the antitrust laws, even for arbitrary action, so long as it acts "in good faith and within the scope of its statutory authority" (Res. Br. 28). We have already shown that exchange action directed not against illegal or unethical member conduct, but against nonmembers who maintain private wires with members, is not within the Exchange's authority, and the district court so held (R. 223-224).

While it is true that MSC, INC.'s "Application For Private Wire Connection" of June 13, 1958 (R. 47) did provide that the wire connection could be discontinued on the Exchange's withdrawal of approval (R. 49), it should be noted that MSC had three private wire connections with member firms for which no approval was sought (R. 42) and that the Exchange construed its action of February 12, 1959 to apply to such connections as well (R. 42-43, 93). Respondent argues, nevertheless, that since MSC, INC. expressly consented to the action complained of, it waived any rights it might have had to a hearing or to a disclosure of the reasons for the Exchange's action (Res. Br. 30-31).

In making this argument, respondent apparently believes that on June 13, 1958, it obtained an immunity from liability for antitrust violations occurring on February 12, 1959, and thereafter (R. 28-31). Respondent should know as well as anyone that an "instrument purporting to absolve a party from liability for future violations of the antitrust laws is void as against public policy." 6 *Toulmin's Anti-Trust Laws*, 588 (1951). There is no way (except, of course, statutory exemption) that respondent could have obtained "immunity from civil liability for future viola-

tions." *Lawlor v. National Screen Service Corp.*, 349 U. S. 322, 329 (1955). Respondent's "consent" argument would "permit a restraint of trade to be engaged in which would have impact, not simply between the parties, but upon the public as well." *Fox Midwest Theatres v. Means*, 221 F. 2d 173, 179-180 (C. A. 8, 1955).

If, as the Exchange asserts, it is immune from the anti-trust laws by reason of the responsibilities delegated to it by Congress (Res. Br. 18-19), we must assume that Congress, which could not itself deny petitioners "due process," nonetheless permitted the NYSE to do so. This, of course, is absurd. Respondent cannot rely on its responsibilities under the Securities Exchange Act to justify arbitrary and unreasonable action. Cf. *International Association of Machinists v. Street*, 367 U. S. 740 (1961).

CONCLUSION

By reason of the foregoing, the decision below should be reversed.

Respectfully submitted,

DAVID I. SHAPIRO,
1411 K Street, N. W.,
Washington 5, D. C.,
Attorney for Petitioners.

DICKSTEIN, SHAPIRO & GALLIGAN,
20 East 46th Street,
New York 17, N. Y.,

GOLDBERG, FONVILLE, GUMP & STRAUSS,
2232 Republic National Bank Building,
Dallas 1, Texas,

of Counsel.